IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 56 of 1986

WITH

INCOME TAX REFERENCE NO. 75 OF 1987

AND

INCOME TAX REFERENCE NO. 58 OF 1993

AND

INCOME TAX REFERENCE NO. 220 OF 1995

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SARABHAI CHEMICALS PVT. LTD. (now known as
Sarabhai Holdings Pvt. Ltd.)

Versus

THE COMMISSIONR OF INCOME-TAX

Appearance:

1. INCOME TAX REFERENCE No. 56 of 1986, 58 of 1993
220 of 1995 and 75 of 1987 :

MR KC PATEL with MR. R.K.PATEL, MR. M.K.PATEL
and MR B.D.KARIA, Advocates for the Assessee in
all References

MR BB NAIK for the Revenue in all References

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE K.A.PUJ

Date of decision: 06/02/2002

ORAL COMMON JUDGEMENT

Per : MR.JUSTICE R.K.ABICHANDANI (for the Court) :-
1. All these four references have been argued at length together and they concern the same assessee and therefore, they are disposed of by this common judgement.

2. In Income Tax Reference No. 56 of 1986 (which emanates from the quantum proceedings in respect of the Assessment Years 1979-80 and 1980-81), the Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad has referred the following questions of for the opinion of this Court :

"For the A.Y. 1979-80 - at the instance of the assessee :

[1] Whether, on facts and in the circumstances of the case, the Tribunal was right in law in holding that the interest of Rs.66,29,236/- being the amount of interest as determined by the Income Tax Officer on a notional basis from 1-7-1977 to 30-6-1978 was liable to tax on accrual basis for A.Y. 1979-80?

[2] Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the interest accrued from day-to-day as a result of supplementary agreement and as such, the same was exigible to tax as

income for Assessment Year 1979-80?

[3] Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that giving up of interest on the ground of commercial expediency was not justified as no direct or indirect benefit had accrued to the assessee?

For the A.Y. 1980-81 - at the instance of the Revenue :

[1] Whether, the Appellate Tribunal has not erred in law and on facts in holding that no income could be said to be accrued to the assessee as the interest would start accruing from 1-7-1979 i.e. after the end of the accounting year?

[2] Whether, the finding of the Tribunal that the interest could not be said to be accrued to the assessee during the accounting period in question and hence, question of relinquishment of any right does not arise is correct in law?"

2.1 In Income Tax Reference No. 75 of 1987 (which also relates to the Assessment Year 1979-80 pertaining to levy of interest under section 215 of the Act), the Tribunal has referred the following question :

"Whether the Appellate Tribunal has not erred in law and on facts in holding that charging of interest under section 215 of the I.T. Act, 1961 in the instant case was not justified?"

2.2 In Income Tax Reference No. 220 of 1995 filed at the instance of the assessee, the Tribunal has, in respect of the Assessment Year 1979-80, referred the following question of law in respect of the penalty levied under section 273(2)(a) of the Act :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in confirming the penalty of Rs.4 lakhs levied under section 273(2)(a) of the Act?"

2.3 In Income Tax Reference No. 58 of 1993 (which also relates to the Assessment Year 1979-80 and is in respect of the penalty imposed under section 271(1)(C) of

the Act), the Tribunal has referred the following question of law :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in confirming the penalty of Rs.55,00,000/- levied under section 271(1)(c) of the Act?"

3. Income Tax References Nos. 56 of 1986 (at the instance of the Assessee as well as the Revenue) and 75 of 1987 (at the instance of the Revenue) arise out of the same judgement of the Tribunal rendered on 15th February 1985 in I.T.A. Nos. 1137 and 1138 / AHD/ 84, by which the Tribunal had partly allowed the assessee's appeal and held in respect of the Assessment Year 1979-80 that levy of interest under section 215 of the said Act was not justified, while upholding the decision of the lower authorities in regard to the Assessment Year 1979-80 to the effect that there was accrual of interest income which was rightly brought to tax on accrual basis by them. As regards the Assessment Year 1980-81, the Tribunal held that, under the revised agreement reflected from the resolution dated 30th June 1979, no interest was payable on the outstanding amount, because, as a result of the resolution dated 30th June 1979, no income could be said to have accrued to the assessee as the interest was to start accruing from 1-7-1979 i.e. after the accounting year relevant to the Assessment Year 1980-81 and the assessee's appeal was, therefore, allowed in respect of the Assessment Year 1980-81.

3.1 The assessee - Sarabhai Chemicals Pvt. Ltd. (now known as Sarabhai Holdings Pvt. Ltd.) had filed its return on 26th June 1979 declaring a total income of Rs.772=00 under the head of business income for the Assessment Year 1979-80, and for the Assessment Year 1980-81, it had filed return on 27-9-1980 declaring a loss of Rs.17,345=00. The assessee was following mercantile system of accounting at the relevant time. In response to the notice under section 143(2) of the Act, the assessee had submitted that, w.e.f. 28th February 1977, the industrial undertaking of Sarabhai Chemicals and business activity of Sarabhai Common Services Division which was a unit of Sarabhai Chemicals were transferred by it to its subsidiary Elscope Pvt. Ltd., which in turn, after four months, transferred them to Ambalal Sarabhai Enterprises Ltd., which was the subsidiary of Elscope Pvt. Ltd. The said agreement was made on 28th February 1977, which was amended by the supplemental agreement dated 4th March 1977 and a deed of assignment came to be executed on 28th June 1977. The

assessee effected the transfer of the industrial undertaking and business of Sarabhai Chemicals Division and Sarabhai Common Services Division to Elscope Pvt. Ltd. as a going concern. On inquiry, the assessee informed the I.T.O., as recorded in the draft order, that during the year, the assessee had not received any interest from Elscope Pvt. Ltd., to whom its undertaking was transferred on 28th February 1977. From the agreement of transfer, the I.T.O. noticed the terms of payment of purchase consideration to the assessee and the fact that, as per those terms, a sum of Rs.2 crore was to be paid as and when demanded by the Company, and it was to carry simple interest at the rate equal to the rate of interest which the Company paid to its bankers in the ordinary course of business, and that the sum of Rs.4,54,18,760=89 ps. which was also a part of deferred purchase consideration, payable in eight equal annual installments on 1st October of every year beginning from 1st October 1979 and was to carry interest at 11% per annum on the said sum or the amount remaining outstanding from time to time. The I.T.O. noted that the assessee was accordingly entitled to interest at the rate stipulated in the said agreement in respect of these amounts. On noticing that, in respect of none of these amounts, the assessee had shown interest as received or receivable, the assessee was, inter alia, asked to show cause as to why interest on accrual basis be not taxed on amounts due from Elscope Pvt. Ltd. as outstanding purchase consideration.

Against the suggestion to tax the income from interest on accrual basis, the assessee sent its objections as per letter dated 16-9-1981, pointing out that no interest was in fact charged or chargeable in these accounting years in view of the revised mode of payment agreed to between the parties as it was to be now charged only with effect from 1-7-1979. The assessee filed exerpts from the minutes of the meeting of the Board of Directors, which was held on 30th June 1978 in support of his explanation.

Thereafter, the assessee filed a further letter on 21-1-1982 explaining as to why the interest should not be taxed on accrual basis in the hands of the assessee, and contending that there were exceptions to the general rule. It was urged that the interest cannot be taxed on a hypothetical basis, because, the assessee did not actually receive any interest.

3.2 The I.T.O. was of the view that, in assessee's case, there was a written contract which was sought to be

modified by the resolution dated 30th June 1978 by which date the interest for the whole year had already accrued to the assessee. It was observed that it was not the case of the assessee that the vendee company had gone into liquidation or had no assets from which the recovery could be effected. The I.T.O. further held that the assessee had relinquished the interest without any commercial consideration and since the two companies were closely related, it was a case of collusion to evade tax liabilities and therefore, interest on accrual basis was taxable in the hands of the assessee. The I.T.O. accordingly made a draft order computing the total income of the assessee at Rs.66,29,236=00 on the count of accrual of interest on the deferred consideration and also ordered to charge interest under section 217 of the Act as well as issued notices for default under section 273 and section 271(1)(c) of the Act.

3.3 The Inspecting Assistant Commissioner of Income Tax, to whom this draft order was forwarded, issued directions under section 144(B)(4) of the Act, after taking into consideration the objections raised by the assessee against the draft order, holding that the Income tax Officer was justified in coming to the conclusion that interest would be chargeable on accrual basis, and that the resolution dated 30th June 1978 passed by the Board of Directors on the last day of the previous year not to charge such interest from a retrospective date was nothing but a device to deprive the revenue of its dues which legitimately accrued to it.

3.4 The final assessment order in respect of the Assessment Year 1979-80 was thereafter made and the interest income as discussed in the draft assessment order as well as in the I.A.C.'s direction under section 144-B (4) was added to the tune of Rs.66,29,236=00 and it was ordered to charge interest under section 215 of the said Act and notices were ordered to be issued for the default under section 273(2)(a) and 271(1)(c) of the Act.

4. The assessee preferred an appeal before the Commissioner of Income Tax (Appeals-I), Baroda, who, by his order dated 29th February 1984, upheld the said addition of interest income, holding that interest was receivable by the assessee under the agreement dated 4th March 1977 and the deed of assignment dated 28th June 1977 and was, therefore, rightly brought to tax in the assessee's hands. The CIT (Appeals) elaborately considered the terms of the supplemental agreement as well as the deed of assignment and held that, for more than fifteen months from 4th march 1977 to 15th June

1978, the stipulations for payment of interest incorporated in the said documents held the field unchallenged and undiluted, and that, it was on 15th June 1978 that the buyer company made a proposal for amendment (in the stipulations) and the assessee ungrudgingly agreed to forgo the interest which exceeded Rs.120 lakhs for two years. The CIT (Appeals) considered the contentions raised by the assessee to the effect that it had agreed to this concession, firstly due to the business expediency and secondly, since the vendee company had offered to furnish security and found that there was nothing said on behalf of the company as to what was the so-called business expediency, and that original agreements were silent on the aspect of security and did not envisage that security would not be furnished. The appellate authority found that the vendee Elscope Pvt. Ltd. was a wholly owned subsidiary of the assessee and that the facts, figures and circumstances, mentioned in paragraph 13 of the order, highlighted the fact that the transaction could not be regarded as entered into any normal course and at arms length. It was observed that the business consideration put forth by the assessee was not actually specified beyond saying that the unsecured loans were offered to be secured. The appellate authority held that the talk regarding purchase price was merely an eye-wash and that it was obvious from the assessee's letter dated 6-1-1984 that the vendee far from offering securities for paying money in cash to the assessee merely furnished secured bonds of Ambalal Sarabhai Enterprises Ltd. to whom it had transferred the undertaking purchased from the assessee. These bonds carried interest of 11% and were redeemable in 1991 or subject to some conditions in 1987. It was observed that they were mortgageable but since they carried interest at 11% only and were not redeemable before 1987, the market price quoted was about two-third of the face value. Thus, in the process, the assessee company had accepted the assets worth two-third of the market price. As per the original agreement, the installments would have started in October 1979 and ended in October 1986, against which, as per the revised terms of the resolution dated 30th June 1978, the installmets would have started falling due from 1987 only. It was observed that, apart from postponement by about eight years, it is obvious that there was no security worth the name actually given by Elscope Pvt. Ltd. for making payments in cash and what was actually given was bonds whose market price was two-third of the face value. All these concessions were given to Elscope Pvt. Ltd. just like that and for no real consideration. In this background, the CIT (Appeals) applying doctrine of lifting the veil of

corporate personality, found that the assessee was the sole shareholder of the vendee Elscope Pvt. Ltd., and that the transaction should be viewed in that perspective. The CIT (Appeals) observed that, taking totality of the connected transactions together, it could not be said that there was no loss caused to the revenue. He however held that the real relevant consideration was of accrual of interest to the assessee.

4.1 As regards the levy of interest under section 215 of the Act, the CIT (Appeals) held that the assessee company had neither filed any estimate, nor paid any advance tax. As per the assessee's letter dated 26-3-1983, it was an admitted fact that the I.T.O. had issued a notice under section 210 of the Act calling upon the assessee to pay advance tax on the basis of regular assessment completed for Assessment Year 1976-77 and thereafter, the notice was revised under section 210, but the assessee filed the estimate of advance tax in form No. 29 showing income of advance tax payable as `Nil'. Rejecting the contention that provision of section 215 of the Act did not apply since the assessee had not paid any advance tax, the CIT (Appeals) held that, in pursuance of the `Nil' estimate, the advance tax paid by the assessee was also `Nil' and that situation was obviously different from a case in which estimate is not filed at all, which would be covered by section 217 of the Act for levy of corresponding interest. It was observed that, to say that the assessee would have been covered by section 215, if it had paid Re.1 advance tax on the basis of estimate, but is not covered by that section, because, the advance tax paid is `Nil' in pursuance of the `Nil' estimate filed would lead to absurdity. He relied on the decision of the Bombay High Court in Bombay Burma Trading Corporation Ltd. v. CIT, reported in (1984) 145 ITR 793 (Bom), in which it was held that the case having `Nil' income from salary chargeable under the Act would be covered by dictate of the law that salary income chargeable was less than Rs.7,500=00. Reliance was also placed on the decision of the Madras High Court in ACE CIT v. Brakes India Ltd., reported in (1979) 118 ITR 820 in this regard and the contention of the assessee that `Nil' estimate of advance tax rules out applicability of section 215, was rejected. It was observed that levy of interest under section 215 of the Act was almost automatic unless and until the assessee was able to show that his `Nil' estimate at the time of filing was the correct estimate. The CIT (Appeals) also observed that the element of consciousness for wrong estimate is needed for levy of penalty under section 273 and not for levy of interest under section 215. It was also observed that

the element of reasonable belief for quantum of income does not come into play in section 215 with that much force as it does in section 217(1A). It was, therefore, held that the decision of the Gujarat High Court in C.I.T. v. Bharat Machinery & Hardware Mart, reported in (1982) 136 ITR 875 could not assist the assessee on the question of interest chargeable under section 215 of the Act. The appellate authority observed that the interest income exceeding Rs.60 lakhs was attempted to be taken out of the taxation net, and that, this was a fit case for levy of interest under section 215 of the Act. It was further observed that, in regard to quantum, no calculation mistake was brought to the notice by applicability of Rule 40 of the Rules made under the Act.

5. The assessee preferred an appeal against the decision of the C.I.T. (Appeals) before the Tribunal. The Tribunal rejected the contention that no interest accrued for the Accounting Year 1-7-1977 to 30-6-1978 on the basis of the resolution dated 30th June 1978, by which the mode of payment incorporated in the original agreement stood revised. It also rejected the contention that, in view of the modification in the original agreement as amended by the supplemental agreement dated 4-3-1977, the interest which was recoverable stood waived. Construing the provisions of the agreement and deed of assignment which has a bearing on the obligation on the part of the vendee Elscope Pvt. Ltd. to pay interest on the deferred consideration, the Tribunal in paragraph 17 of its order held :

"In the instant case, the income from interest on unpaid purchase price was a vested right created under the supplemental agreement, as a consequence the income from interest could be said to be accrued or arisen to the assessee during the relevant accounting year. In this connection, it is pertinent to note that while the supplemental agreement forms part of the original agreement, there is no indication in the resolution to suggest that the revised mode of payment was effective from any date prior to 30-6-1978. Therefore, this is not a case where the income though given up during the year could not be said to accrue as was the case in managing agency commission, the determination of which was based on accrual of profits. The accrual of interest commenced from the beginning of the accounting year as the interest accrues from day to day."

5.1 Considering the alternative contention of the assessee that if the interest had accrued, that income should be excluded from chargeability on the ground of commercial expediency, the Tribunal held that there was no material for reaching to a conclusion that the income from interest was given up on the ground of commercial expediency. The only ground that was placed before the Tribunal was that the unpaid purchase price which was unsecured had become secured under the revised mode of payment. The Tribunal held that this aspect did not carry the matter anywhere. The vendee Elscope Pvt. Ltd. was a subsidiary of the assessee and its entire share-holding was owned and controlled by the assessee. The security which was offered in terms of secured debentures of Ambalal Sarabhai Enterprises Ltd. to whom the undertaking was transferred by Elscope Pvt. Ltd. was again a subsidiary of Elscope Pvt. Ltd. Therefore, the offering of secured debentures to cover the unpaid purchase price would not give some added commercial benefit to the assessee which otherwise was secured in view of its position as the sole shareholder of its fully owned subsidiary and also vis-a-vis Ambalal Sarabhai Enterprises Ltd., which was a fully owned subsidiary of Elscope Pvt. Ltd. The Tribunal observed that when substantial portion of its income which had accrued was sought to be given up by the assessee, there ought to be some corresponding benefit matching giving up of such income, but there was nothing to indicate in this matter that the benefit accruing to the assessee was such as would outweigh the right which it was giving up. It was finally held that the inevitable conclusion which can be reached so far as the Assessment Year 1979-80 was concerned, was that there was accrual of interest as a result of the supplement agreement and that the interest amount was rightly brought to tax on accrual basis.

5.2 As regards the ground on which the interest charged under section 215 was challenged, the Tribunal in paragraph 23 of its judgement observing that, though it had rejected the assessee's claim that on the basis of resolution dated 30th June 1978 it had modified its original arrangement and therefore, there was no accrual of income and hence, no liability to advance tax was rejected by it, "it cannot be said that the assessee could predicate the said assessment based on estimate of notional income from interest. The question of determining accrual of income is a highly complex issue and the fact that a decision is reached against the assessee cannot be determinative of its liability to pay advance tax which arises in accordance with the statutory date fixed in the Act." Relying upon the decision of this

Court in C.I.T. v. Bharat Machinery & Hardware Mart, reported in (1982) 136 ITR 875, the Tribunal held that levy of interest under section 215 of the Act, on the facts of the case, was not justified for the Assessment Year 1979-80. The assessee's appeal was accordingly partly allowed on the question of interest under section 215 of the Act.

6. Income Tax Reference No. 75 of 1987 arises from that part of the order of the Tribunal passed in respect of the Assessment Year 1979-80 by which the assessee's appeal was partly allowed and interest added under section 215 of the Act deleted.

6.1 For the reasons which were given by the C.I.T. (Appeals) in the appellate order dated 29-2-1984 for confirming the addition of Rs.66,29,236=00 as interest accrued for the Assessment Year 1979-80, the C.I.T. (Appeals) confirmed the addition of Rs.55,67,750=00 on the same count for the Assessment Year 1980-81 by his order dated 29th February 1984. The levy of interest under section 215 was also confirmed in respect of the said Assessment Year.

7. In appeal, the Tribunal held in paragraph 20 of the order that there was a material distinction between the facts that obtained in the earlier year i.e. Assessment Year 1979 - 80 and in the Assessment Year 1980-81. It observed that the material difference was caused by the assessee's resolution dated 30th June 1978 under which the original agreement stood modified. It was held that, as a result of the said resolution, no income could be said to have accrued to the assessee as the interest was to start accruing from 1-7-1979 i.e. after the end of the Accounting Year from 1-7-1978 to 30th June 1979. Moreover, since there was no accrual of income at all, there could arise no question of relinquishment of any right to receive the income. It was held that the reduction of the tax liability was a consequence of the modified arrangement, as per which, the income did not accrue during the said accounting period relevant to the Assessment Year 1980-81. It was, therefore, held that the inclusion of the amount of interest for Assessment Year 1980-81 was not justified. The addition was therefore deleted and the assessee's appeal was allowed by the Tribunal for the Assessment Year 1980-81, giving rise to the two questions raised at the instance of the revenue in Reference No. 56 of 1986.

8. As noted above, notice was issued under section 273(2)(a) and also under section 271(c) of the Act in

respect of the Assessment Year 1979-80. In the penalty order made under section 273(2)(a) of the Act, on 9th August 1988, the Assistant Commissioner of Income Tax came to a finding that the assessee had committed a default by filing `Nil' estimate of advance tax payable by it, which it had reason to believe to be untrue and imposed penalty of Rs.4 lakhs under section 273(2)(a) of the Act against the maximum penalty of Rs.50,89,815=00 leviable for the default. A notice under section 210 was served on the assessee on 17th October 1978 requiring payment of advance tax of Rs.1,00,22,757=00. By a subsequent notice under section 210 of the Act served on the assessee on 8th December 1978, the assessee was required to pay advance tax of Rs.1,28,74,172=00. In response to these notices, the assessee filed an estimate showing `Nil' amount of advance tax payable on 14th December 1978.

8.1 In response to the show cause notice issued under section 274 read with section 273(2)(a) of the Act, the assessee contended that it had made an honest and fair estimate of the total income, and that it believed that the amount in question was not includible in its total income as no income was received by the assessee. The said authority agreed with the observation of C.I.T. (Appeal) - Baroda in which it was observed that interest income exceeding Rs.60 lakhs was attempted to be taken out of the taxation net and that fact would not impart reasonableness to the estimates of advance tax. It was held that the assessee had committed a default by filing `Nil' estimate of advance tax payable by it which it had reason to believe to be untrue, which default was liable to be punished under section 273(1)(a) of the Act.

8.2 The C.I.T. (Appeal), by the order dated 15th March 1989 made in the appeal of the assessee against the said order imposing penalty under section 273(2)(a) of the Act, held that, while filing the `Nil' estimate of advance tax on 14-12-1978, the assessee had full knowledge of interest income of Rs.66,29,236=00, which had already accrued and also knew that it could not forgo the income that had already accrued by passing a resolution on a subsequent date. The order of penalty was, therefore, confirmed.

8.3 The assessee appealed against the order of the C.I.T. (Appeal) confirming the penalty under section 273(2)(a) of the Act before the Tribunal and the Tribunal, concluding that interest was payable to the assessee from 1-3-1977 by Elscope Pvt. Ltd. in pursuance of the agreements and the deed of assignment,

and observing that the case of Packart Pvt. Ltd. in which penalty imposed under section 273(2)(a) of the Act was deleted, stood on a different footing, because, in that case, the amount of addition on account of accrual of interest in the quantum proceedings was set aside and the matter was restored back to the Income Tax Officer and was pending, held that the `Nil' estimate filed by the assessee on 14-12-1978 was, prima facie, untrue within the knowledge of the assessee and that the penalty was therefore rightly levied under section 273(2)(a) of the Act by the authorities below.

9. After the notice under section 271(1)(c) was issued as noted above, in respect of the Assessment Year 1979-80, the assessee was given an opportunity of being heard before finalising the penalty proceedings by the Assistant Commissioner of Tax vide letter dated 26-11-1987 referred to in paragraph 19 of the order and the assessee, by its letter dated 9th March 1988, furnished its reply relying on its earlier replies dated 29-10-1982, 26-6-1984 and 30-8-1985. The Assistant Commissioner of Income Tax, by his order dated 9th August 1988, held that the facts of the case and the subsequent acts of the assessee as analyzed by the Income Tax Officer in the assessment order, the C.I.T. (Appeal) and the Tribunal in the appellate orders, would go to establish that there was gross and wilful attempt on the part of the assessee to evade tax on interest income that had accrued to it on the deferred sale consideration payable on its undertakings being transferred as per the original agreement. It was held that the waiver of interest was not done by the assessee on account of any commercial expediency as alleged, but only to benefit its own group of companies. It was further held that the action of waiver of interest by the assessee company amply goes to show that it had willfully made an attempt not to bring to tax the interest income receivable by it under the agreements and that the transaction involved in this case could be reasonably termed as a colourable device to evade tax on its legitimate income, by dubious methods. It was further observed that, by accepting the proposal of Elscope Pvt. Ltd. for modifying the agreement dated 28-2-1977 to waive interest upto the period ending on 30th June 1979, the assessee had deprived the revenue of its legitimate tax on the interest income that had accrued as per the original agreement. The assessee did not disclose the said income to the Department nor did it furnish all the relevant particulars of that income and it was only when the Department could lay its hands on this "dubious method of transaction", that the facts came to light. The

Assistant Commissioner of Income Tax concluded that Explanation I of section 271(1)(c) of the said Act was, therefore, clearly attracted in this case, and that the assessee had failed to offer any bonafide and satisfactory explanation in the matter, holding that the assessee had not disclosed fully and truly all the material facts necessary for its assessment and had concealed the particulars of its income from interest (of Rs.66,29,236), which had accrued on the deferred sale considerations in respect of the said transfer. Penalty of Rs.55 lakhs was thus imposed on the assessee under section 271(1)(c) of the Act.

9.1 The assessee appealed against the aforesaid penalty order and the Commissioner of Income Tax (Appeals), Baroda, by his order dated 8th January 1990, dismissed the appeal, holding that no justifiable explanation in support of its claim that the income of interest had not accrued during the said accounting year, was given by the assessee, and that the assessee's case fell within the ambit of explanation 1 to section 271 (1)(c) of the Act. It was observed that the supplemental agreement indicated that interest was considered as payable. It was observed that the agreements subsequent to the resolutions dated 25-2-1977 and 3-3-1977 indicated that interest was considered as payable and that it was only at the fag end of the year that it was agreed to be charged from 1-7-1979. It was further observed that the agreements confirming the charging of interest at the rates specified and from specific dates were more binding on the parties than these earlier resolutions which were now tried to be relied upon by the assessee. The subsequent agreements had the effect of overruling intention recorded in the resolution dated 25-2-1977. The C.I.T. (Appeals) also held that if there were no commercial considerations justifying postponement / waiver of interest in a normal business transaction, interest should have been charged on the balance amount due and receivable from the day from which the transfer was made effective. The change which was brought about by the resolution dated 30th June 1978 by which it was agreed to charge interest from 1-7-1979 was not part by any commercial consideration and that by resorting to a scheme, the assessee had omitted to include the accrued interest in its total income and thereby furnished inaccurate particulars of his total income.

9.2 The order of the C.I.T. (Appeals), confirming the penalty imposed on the assessee, came to be challenged by the assessee before the Tribunal and the Tribunal, by its order dated 5-12-1991, dismissed the

appeal, holding that the assessee had concealed the particulars of its interest income to the tune of Rs.66,29,236=00 and that A.C.I.T. had rightly levied penalty of Rs.55 lakhs under section 271(1)(c) which was in turn, rightly confirmed by the C.I.T. (Appeals). The Tribunal observed that the assessee had failed to substantiate the explanations submitted in the penalty proceedings and had also failed to disclose all the material facts relating to the aforesaid items of addition in the return of income and the statements accompanying the said return. The Tribunal noted that, nowhere in the return of income or in the statements accompanying the said return, the fact about the passage of the resolution dated 30th June 1978 was mentioned. The assessee was fully conscious of the fact at the time of closing of the accounting year that if such interest income would be accounted for, it would be liable to a huge tax liability of more than Rs. 45 lakhs and therefore, the resolution dated 30th June 1978 was passed with a view to nullify the accrual of interest income, which had really accrued on the basis of the agreement. It was also held that Elscope Pvt. Ltd. did not take any steps at all to furnish any security pursuant to the said mutual agreement made in terms of resolution dated 30-6-1978, in which it was mentioned that the security should be furnished to the satisfaction of the assessee in respect of unpaid purchase price. Referring to the additional evidence in form of the earlier resolutions dated 25-2-1977 and 3rd March 1977, the Tribunal observed that they did not in any manner support the contention of the assessee about non-accrual of the income upto 30th June 1978 by virtue of these resolutions, but they, on the contrary, destroyed the reliability and veracity of the submissions made in the quantum proceedings. It was also held that the rights of the contracting party were governed by the terms of the agreement and the contract executed between them and the prior resolutions dated 28-2-1977 and 3-3-1977 could not override the specific terms of the contract.

9.3 In respect of the resolution dated 25-2-1977, after perusing the original minute book, the Tribunal in paragraph 8.3 of its judgement observed that, the crucial 3 to 4 lines of the clause (reproduced in that paragraph) including the date with effect from which the interest was to be charged was admittedly subjected to rewriting after erasing the crucial lines. It appears that this rewriting has weighed with the Tribunal while holding against the assessee and observing that the assessee's stand that it had forgotten to bring to the notice of its representative in the quantum proceedings this earlier

resolution could not be accepted as a reasonable or valid explanation.

10. In context of the reference having bearing on the quantum proceedings (Reference No.56 of 1986), the learned counsel for the assessee contended that, in view of the resolution dated 30th June 1978 passed by the assessee, accepting the proposal of the vendee Elscope Pvt. Ltd. contained in their letter dated 15th June 1978, which both documents were produced during the course of assessment proceedings, there was no accrual of interest to the assessee on the amount of deferred consideration till 30th June 1979. It was argued that, under the original agreement dated 28-2-1977 as modified by the supplemental agreement dated 4th March 1977, as also in the deed of assignment dated 28-6-1977, though interest was to be paid on the amount of deferred consideration, no date was mentioned for accrual of such interest and therefore, it should be held that interest was to be paid only from the date on which the installments were to fall due and were not paid. It was further argued that, before the end of the Accounting Year 1978-79 (i.e. from 1-7-1977 to 30-6-1978), it was open for the assessee to agree to modification of the terms of mode of payment and substitute the original stipulation regarding payment of interest by fixing the time from which the interest would accrue and accordingly, by such modification, the date of accrual of interest was fixed as 1-7-1979 under the resolution dated 30th June 1978. The learned counsel submitted that there was no challenge against the genuineness of the resolution dated 30th June 1978 at any stage of the proceedings uptill now and once that resolution is held to be genuine, it should be given its full play and it should be held that no interest accrued till 30-6-1979 by virtue of this resolution, even if it were to accrue under the mode of payment earlier stipulated in the deed of assignment. It was further argued that, in the event the Court comes to the conclusion that the interest income did accrue during the said Accounting Year from 1-7-1977 to 30-6-1978, it should be held that the income so accrued on mercantile basis of accounting was given up by the assessee for valid consideration which was commercial expediency. The assessee wanted to re-organise its business and this fact was recorded even in the agreements and deed of assignment and it is not as if the arrangements were made as a device to evade taxes. The assessee wanted to put more capital in the hands of its subsidiary Elscope Pvt. Ltd., and there were further transactions between Elscope Pvt. Ltd. and its own subsidiary, and all these transactions were genuine and

in reality, entered into as per the scheme of reorganisation. It was submitted that, under the original agreement and deed of assignment, there was no mention about any security being furnished in respect of the outstanding amount payable by Elscope Pvt. Ltd. to assessee, while in the proposal dated 15th June 1978 sent by Elscope Pvt. Ltd. to the assessee, there was a clear offer of giving security in respect of the deferred consideration which was required to be paid by Elscope Pvt. Ltd. to the assessee. Since the proposal was coupled with this offer, the assessee, with a view to get its dues secured, shifted the date of accrual of interest on the deferred consideration to 1-7-1979 by accepting the proposal of Elscope Pvt. Ltd. and passing the said resolution dated 30th June 1978.

10.1 As regards the penalty proceedings from which the Income Tax Reference No. 58 of 1993 arises, the learned counsel for the assessee argued that there was no concealment of material particulars during the assessment proceedings and the assessee had disclosed the relevant particulars, which had a bearing on the computation of the income including the income said to have accrued by way of interest on the deferred payment in connection with the said Assessment Year 1979-80. It was submitted that the assessee bonafide believed in his explanation given in the assessment proceedings to the effect that no interest had accrued on the basis of the resolution dated 30th June 1978 and that fact was supported by additional evidence adduced during the penalty proceedings alongwith the reply dated 9th March 1988. It was submitted that the resolution dated 25th February 1977 clearly recorded the fact that the interest was payable on the deferred consideration from 1-7-1978 and merely because there was rewriting in some portion of that resolution, it could not be inferred that it was not a genuine resolution. He pointed out from the circular resolution dated 3-3-1977, in the same minute book, that this date of 1-7-1978 was also mentioned there without any erasion. In other words, from the contemporaneous record, it can be seen that the rewriting in the resolution dated 25-2-1977 in the minute book was not an attempt to change the date of accrual of interest to 1-7-1978. It was also mentioned in the corresponding resolution of Elscope Pvt. Ltd. The learned counsel further argued that since the assessee bonafide believed that the explanation offered by it was correct, the presumption under Explanation I did not arise in the case of the assessee. It was contended that admittedly it was nobody's case that false explanation was given by the assessee; but, the case against the assessee was that he had not been able to

substantiate his explanation during the assessment proceedings which fell under sub-clause `B' of Explanation I and which in turn attracted the provisions of the proviso under which it could be shown that the belief of the assessee was bonafide, in which event, the Explanation would not apply and no presumption could be raised. It was also argued that all the material particulars having bearing on computation of the assessee's income that is said to have accrued by way of interest on deferred payment were furnished during the proceedings in form of agreements, deed of assignment, notes in the balancesheet showing the transaction, reference to the transaction in context of `Nil' capital gains etc. and it is on the basis of the material which was already adduced that the Department came to the conclusion that interest had accrued for the Assessment Year 1979-80.

10.2 As regards the reference arising from the order imposing penalty under section 273 (2) (a) of the said Act which is the subject matter of Reference No.220 of 1995, it was argued that when `Nil' estimate was filed by the assessee in response to the notice under section 210 of the said Act, it had no reason to believe that estimate to be untrue, because, on the date when the estimate was filed, resolution dated 30th June 1978 accepting the proposal of the vendee to substitute the mode of payment of the deferred consideration amount by shifting the date of accrual of interest to 1-7-1979, was already in existence. It was argued that the requisite mental element that the estimate was untrue was absent in assessee's case and therefore, no penalty could have been levied under section 273 (2) (a) of the Act.

10.3 In context of the Income Tax Reference No. 75 of 1987, the learned counsel for the assessee contended that the Tribunal had rightly set aside the order directing recovery of interest under section 215 of the said Act on the ground that the question of accrual of interest was a complex one and that the assessee could not predict assessment based on estimate of notional income from interest. It was also argued in this context that section 215 of the said Act was attracted only in cases where the assessee had paid a sum of advance tax under section 209A or section 212 of the Act and therefore, when `Nil' advance tax was paid, the provisions could not be invoked for the purpose of levying interest.

11. In support of his above contentions, the learned counsel for the assessee relied upon the following decisions :

[a] Decision in case of C.I.T., Tamil Nadu v. Motor Credit Co. P. Ltd., reported in 127 ITR 572 was cited for the proposition that if no income has materialised, there can be no liability to tax on a hypothetical income and it is not the hypothetical accrual of income based on the mercantile system of accounting followed by the assessee that has to be taken into account, but what should be considered is whether the income has really materialised or resulted to the assessee. The question whether real income has materialised to the assessee has to be considered with reference to commercial and business realities of the situation in which the assessee has been placed and not with reference to his system of accounting.

[b] Decision in case of Sreelekha Banerjee v. Commissioner of Income Tax, reported in XLIX ITR 112 was cited for the proposition that if the explanation shows that the receipt was not of an income nature, the department cannot act unreasonably and reject that explanation to hold that it was income. It was also held by the Supreme Court that if, however, the explanation is unconvincing and one which deserves to be rejected, the department can reject it and draw the inference that the amount represents income either from the sources already disclosed by the assessee or from some undisclosed source.

[c] Decision in case of H.M. Kashiparekh & Co. Ltd. v. Commissioner of Income Tax, Bombay North, reported in XXXIX ITR 706 (Bom) was cited for the proposition that it was the real income of the assessee company for the accounting year that was liable to tax and that the real income could not be arrived at without taking into account the amount forgone by the assessee. The principle of real income is not to be so subordinated as to amount virtually to a negation of it when a surrender or concession or rebate, in respect of managing agency commission, is made, agreed to or given on grounds of commercial expediency, simply because it takes place some time after the close of an accounting year. The Court held that, in examining any transaction and situation of this nature, the court would have more regard to the reality and speciality of the situation rather than the purely theoretical or doctrinaire aspect

to it.

[d] Decision in case of Commissioner of Income Tax v. Calcutta Discount Co. Ltd., reported in 91 ITR 8 was cited for the proposition that an assessee can so arrange his affairs as to minimize his tax burden. It was held that, where a trader transfers his goods to another trader at a price less than the market price, and the transaction is a bona fide one, the taxing authority cannot take into account the market price of those goods, ignoring the real price fetched, to ascertain the profit from the transaction. It was held that, if the assessee had arranged its affairs as to reduce its tax liability by starting a subsidiary company and transferring its shares to that subsidiary company and thus, forgoing part of its own profits and at the same time, enabling its subsidiary to earn some profits, such a course is not impermissible under law.

[e] Decision in case of Commissioner of Income Tax v. M/s Shoorji Vallabhdas & Co., reported in XLVI ITR 144 was cited for the proposition that though the Income Tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt, yet the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a `hypothetical income', which does not materialize. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account.

[f] Decision in case of V.D.M. RM. M. RM. Muthiah Chettiar v. Commissioner of Income Tax reported in 74 ITR 183 was referred to point out that the Supreme Court held that since there was no clause which required disclosure of the income of any person other than the income of the assessee, which was liable to be included in his total income in the prescribed form of return, and the

assessee was not required under section 22(5) of the Income Tax Act 1922 in making a return to disclose that any income was received by his wife or minor child admitted to the benefits of partnership in a firm of which he was a partner, re-assessment proceedings cannot be commenced under section 34(1)(a) of that Act against the assessee for failing or omitting to disclose that income. This judgement was rendered by a bench of three judges of the Supreme Court and was considered in a later judgement of the two-judge bench of the Supreme Court in C.I.T. v. Smt. P.K. Kochammu Amma, Peroke, reported in 125 ITR 624, in which, while stating that, "With the greatest respect to the learned judges who decided this case, we do not think, for reasons already discussed, that this decision lays down the correct law on the subject.....", it was observed that the said decision was binding upon the bench as it was a three judge bench decision.

[g] Decision of the Punjab High Court (which was later on reversed by the Supreme Court) in case of Shiv Parkash Janakraj & Co. (P) Ltd. v. Commissioner of Income Tax, reported in 112 ITR 873, was cited for the proposition that where no interest had actually been paid to the assessee company, nor had it made any debit entries in its account books and no date was fixed in the agreement of loan regarding the payment of interest, it cannot be said that the income from interest had actually accrued to the assessee even if the assessee company had adopted the mercantile system of accounting. Reliance on this decision of the Punjab High Court has been placed with a view to argue that this judgement was rendered on 27th September 1977 during the accounting year of the assessee, and that it should constitute a bona fide belief on the legal aspect of the matter when the assessee had put forth the explanation that, on the strength of the resolution of 30th June 1978, interest could not be said to have accrued since the accrual date was shifted thereunder to 1-7-1979.

[g-1] The above decision was reversed by the Supreme Court in Commissioner of Income Tax v. Shiv Prakash Janak Raj & Co., reported in 222 ITR 583, in which the Supreme Court in terms held that the concept of real income cannot be employed so as

to defeat the provisions of the Act and the Rules. Where the provisions of the Act and the Rules apply, it is only those provisions which must be applied and followed. There is no room-nor would it be permissible for the court to import the concept of real income so as to whittle down, qualify or defeat the provisions of the Act and the Rules. Here, we may also refer to the decision of the Supreme Court in State Bank of Travancore v. Commissioner of Income Tax, reported in 158 ITR 102, in which the Supreme Court held that the concept of reality of the income and the actuality of the situation are relevant factors which go to the making up of the accrual of income but once accrual takes place and income accrues, the same cannot be defeated by any theory of real income. The concept of real income cannot be so used as to make accrued income non-income simply because after the event of accrual, the assessee neither decides to treat it as a bad debt nor claims deduction under section 36(2) of the Act, but still enters the same with a diminished hope of recovery in the suspense account. Extension of the concept of real income to this field to negate accrual after the amount had become payable is contrary to the postulates of the Act. It was also held that where interest has accrued and the assessee has debited the account of the debtor, the difficulty of recovery would not make its accrual non-accrual.

[h] A decision of this Court in Banyan and Berry v. Commissioner of Income Tax, reported in 222 ITR 831 was cited to point out that it was held therein that the factum of transfer of the business as a going concern excepting the retention of right to the pending claim, could not be termed a colourable device. It was held that there was no basis for the Tribunal to hold that the dissolution of the firm after transfer of the business was a mere device and not a genuine act of parties. The High Court referring to the decision of the Supreme Court in McDowell's case [154 ITR 148 (SC)] held that, "The Court nowhere said that every action or inaction on the part of the taxpayer which results in reduction of tax liability to which he may be subjected in future, is to be viewed with suspicion and be treated as a device for avoidance of tax irrespective of legitimacy or

genuineness of the act .....". It was held that, "The facts and circumstances which led to McDowell's decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity".

[i] The decision in Commissioner of Wealth Tax v. Arvind Narottam, reported in 173 ITR 479 was cited for the proposition that where the true effect on the construction of the deeds is clear, appeal to discourage tax avoidance is not a relevant consideration.

[j] The decision of the Supreme Court in Commissioner of Income Tax v. Asiatic Textile Ltd., reported in 82 ITR 816 was referred to in order to point out that, in the matter of declaring dividend, the reasonableness or unreasonableness of the amount distributed as dividends is judged by business considerations, such as the previous losses, the present profits, the availability of surplus money and the reasonable requirements of the future and similar others. The Income Tax Officer must take an overall picture of the financial position of the business. He should put himself in the position of a prudent businessman or the director of a company and deal with the problem with a sympathetic and objective approach.

[k] In Commissioner of Income Tax v. Birla Gwalior (P) Ltd., reported in 89 ITR 266, in context of the commission given up by the respondent, it was held that such commission which is given up could not be considered to be its real income of the managing agency. This decision was rendered in the context where the managing agency commission which could have been ascertained only after the managed company had made up its accounts and the respondent had given up the commission even before the managed company made up its accounts, and no date had been fixed in the agreement for payment of the commission and it was held that mere fact that the respondent was maintaining its

accounts on the mercantile system did not lead to the conclusion that the commission had accrued to it by the end of the relevant accounting year. It will be noticed that the accrual of the managing agency would have taken place only at the end of the accounting year when the profit was ascertained.

[l] The decision of the Supreme Court in E.D.Sassoon & Company v. Commissioner of Income Tax, reported in XXVI ITR 27 was cited for the proposition that, if the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later, on its being ascertained. The basic conception is that he must have acquired a right to receive the income, and that there must be a debt owed to him by somebody. Unless and until there is created in favour of the assessee a debt due by somebody, it cannot be said that he has acquired a right to receive the income or that income has accrued to him.

[m] The decision of this Court in Commissioner of Income Tax v. Bharat Machinery & Hardware Mart, reported in 136 ITR 875 was cited to point out that, in a matter where the difference between the returned income and the assessed income had arisen due to the addition made by the ITO by an estimate of the gross profits under the proviso to section 145(1), no interest could be charged under section 217(1A) for failure of the assessee to file an estimate under section 212(3A). The Court observed that;

"In a given set of facts, an assessee may be expected to anticipate on his own even in regard to the estimate which the ITO might make in exercise of the powers under the proviso to section 145(1) of the Act in the light of past experience."

Confining the ratio to the facts of the case, the Court observed that;

"There may be innumerable situations such as the one illustrated by us in which the assessee may be required to make an estimate as enjoined by section 212(3A). We do not propose to undertake the exercise of anticipating and enumerating

them exhaustively. Suffice it to say the present case does not fall under that category."

[m-1] In this context, reference may be made to the decision of the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income Tax, reported in 160 ITR 961, in which, in context of the provision of section 215 of the Act, approving the decision of the Gujarat High Court in Bhikhoobhai N. Shah v. Commissioner of Income Tax, reported in 114 ITR 197, it was held that, interest is levied under sub-section (8) of section 139 and under section 215, because, by reason of the omission or default mentioned in the relevant provision, the revenue is deprived of the benefit of the tax for the period during which it had remained unpaid. The very period for which interest is levied under the relevant provision points to the nature of the levy and the levy of interest is part of the process of assessment. Where the Income Tax Officer considers that there is a case for levying interest under sub-section (8) of section 139 or under section 215, what he does in practice, is to make an order levying such interest after completing the assessment of the assessee's total income and the tax payable by him. In cases where the jurisdictional fact attracting the levy cannot be disputed, for example, where the return has been furnished under section 139 with delay, it will be a question merely of satisfying the relevant authority that there are circumstances calling for a reduction or waiver of the interest.

[m-2] In Commissioner of Income Tax v. Gordhanbhai Jethabhai, reported in 205 ITR 279, this Court applying the decision in Central Provinces Manganese Ore Co. Ltd. (supra), held that the history of section 215 and the way it has worked and also the case law clearly indicate that interest becomes payable by the assessee as a result of operation of law and it is not made dependent upon the discretion of the Income Tax Officer. The discretion which is conferred upon the Income Tax Officer is not with respect to determination of payability of interest but with respect to reduction or waiver of interest payable by the assessee. While deciding whether interest under section 215(1) is payable by the

assessee or not, what the Income Tax Officer has to consider is whether the required conditions are satisfied or not, and he would be under no obligation to consider whether interest should be reduced or waived, which question would arise only after payment of interest is determined.

[n] The decision of the Patna High Court in Commissioner of Income Tax v. Lal Babu, reported in 122 ITR 1006 was relied upon for the proposition that the provisions contained in section 271(1)(c) of the Act apply only to concealment of "his income"; they do not speak of concealment of such incomes as are includible by a fiction of law in "his income". The High Court upheld the decision of the Tribunal in holding that there was no obligation on the assessee to include in his return of income, the income arising to his wife and minor sons which were includible in his income in terms of section 64 of the Act and the failure of the assessee to do so did not attract the penal provisions of section 271(1)(c) of the Act against him.

[o] The decision of the Supreme Court in Commissioner of Income Tax v. Anwar Ali, reported in 76 ITR 696 was cited for the proposition that if there is no evidence on the record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes his taxable income. It would be perfectly legitimate to say that the mere fact that the explanation of the assessee is false does not necessarily give rise to the inference that the disputed amount represents his income. It was held that it cannot be said that the finding given in the assessment proceedings for determining or computing the tax is conclusive. However, it is good evidence. Before penalty can be imposed, the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars. The decision in Commissioner of Income Tax v. Khoday Eswarsa & Sons, reported in 83 ITR 369 in which Anwar Ali's case (supra) was followed, was cited to point out that it was held therein that the penalty proceedings being penal in character, the department must establish that

the receipt of the amount in dispute constitutes income of the assessee.

[o-1] We may note here that, in Commissioner of Income Tax v. Jeevan Lal Sah, reported in 205 ITR 244, the Supreme Court held that, even after the amendment of 1964, penalty proceedings continue to be penal proceedings, and that where the Explanation has made a difference is while deciding that question the presumption created by it has to be applied, which has the effect of shifting the burden of proof. It was held that the rule regarding burden of proof enunciated in C.I.T. v. Anwar Ali (1970) 76 ITR 696 (SC) is no longer valid. Whether it is a case of undisclosed or unexplained cash deposit or any other concealment the standard is the same. The principle enunciated in Anwar Ali's case that mere rejection of the explanation of the assessee is not sufficient for levying penalty no longer holds good and it is no longer necessary that the Department must go further and establish that there was conscious concealment of particulars of income or a deliberate failure to furnish accurate particulars. It was held that the cases to which the Explanation is attracted have to be decided in the light of the law enunciated in the cases of Mussadilal Ram Bharose (1987) 165 ITR 14 (SC) and Sadayappan (1990) 185 ITR 49 (SC).

[o-2] In B.A.Balasubramaniam & Bros. Co. v. Commissioner of Income Tax, reported in 236 ITR 977, the Supreme Court held that after the incorporation of the Explanation in section 271(1)(c) of the Income Tax Act, 1961, the view which had been taken earlier in CIT v. Anwar Ali (supra), no longer holds the field and it is for the assessee to prove that there had been no concealment of income where the income shown in the return is less than eighty per cent of the assessed income.

[p] The decision of this Court in Smt. Ramalaxmi Jivraj v. Commissioner of Wealth Tax, reported in 138 ITR 731, which was rendered in context of the provisions of sections 14 and 18 of the Wealth Tax Act, 1957, was cited for the proposition that the penalty was leviable under section 18(1)(a) of the Wealth Tax Act only if it is established that the assessee has, without reasonable cause, failed to furnish the return

which he or she was required to furnish in response to a notice given under sub-section (2) of section 14, and that if the assessee's net wealth was not taxable, it would be open to the assessee to contend that the failure to furnish a return could not be said to be without reasonable cause.

[q] The decision of the Supreme Court in Commissioner of Income Tax v. A. Raman & Co., reported in 67 ITR 11 was referred to for the proposition that avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income Tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violated, but it may lawfully be circumvented.

[q-1] Reliance on this decision of the Supreme Court is wholly misconceived, because the above observations were disapproved in McDowell & Co. Ltd. v. Commercial Tax Officer, reported in 154 ITR 148.

[r] The decision of the Andhra Pradesh High Court in Commissioner of Income Tax v. Sri Venkateswara Timber Depot, reported in 230 ITR 675, which was in context of the provisions of section 271(1) Explanation 1 sub-clause (B), was cited for the proposition that, if no finding that the assessee had not been able to substantiate the explanation could be recorded, the amount added or disallowed in computing the total income can not be deemed to represent the income in respect of which particulars have been concealed for purpose of clause (c) of sub-section (1) of section 271. In such a situation, there is no need to look to the requirements of the proviso to the Explanation.

[s] The decision of this Court in K.M.Bhatia v. Commissioner of Income Tax, reported in 193 ITR 379 was cited to point out that, when inconsistent approach was adopted by the tribunal in rejecting the explanation, the levy of penalty was not valid. In that case, the Tribunal had adopted inconsistent and incongruous stand in upholding the penalty in respect of the year

1971-72 and the same explanation which was given by the assessee, namely, mistake of the accounts clerk which was put forth at the earliest point of time was accepted by the Tribunal for the year 1972-73 and an inconsistent approach was adopted by the Tribunal in respect of that very explanation for the year 1971-72.

[t] The decision of this Court in Commissioner of Income Tax v. S.P. Bhatt, reported in 97 ITR 440 was cited for pointing out that it was held therein that the burden of proof under explanation to section 271(1)(c) is akin to that in a civil case where the determination is made upon preponderance of probabilities, and that it was not necessary that any positive material should be produced by the assessee in order to discharge the burden that rests upon him.

[u] The decision of the Supreme Court in Commissioner of Income Tax v. Mussadilal Ram Bharose, reported in 165 ITR 14 was referred to for the observations made therein that, the explanation to section 271(1)(c) of the Income Tax Act, 1961 shifts the burden to the assessee to show that the difference was not owing to fraud or gross or wilful neglect on his part, and that this onus is rebuttable. In the said decision, it was also observed that the burden placed upon the assessee is not discharged by any fantastic explanation. Nor is it the law that any and every explanation by the assessee must be accepted. It must be an explanation acceptable to the fact finding body.

The ratio of Musaddilal's case (supra) was followed in Jeevan Lal Sah's case (supra) and B.A. Balsubramaniam's case (supra).

[v] The decision of this Court in Commissioner of Income Tax v. Vinaychand Harilal, reported in 120 ITR 752 was cited for the proposition that, normally, the revenue must establish that the receipt of the amount in question constituted the income of the assessee. The Explanation to section 271(1)(c) of the Act enables the revenue to discharge this burden of proof laid on it if the condition regarding the returned income being less than 80 per cent of the assessed income is satisfied. But the presumption can be rebutted by the assessee.

[w] The decision of the Supreme Court in M.M.Manasvi v. Commissioner of Income Tax, reported in 86 ITR 557 was cited for the proposition that, satisfaction in the very nature of things under section 271(1) precedes issuance of notice and it would not be correct to equate the satisfaction of the Income Tax Officer with the actual issuance of notice. In that case, the Court held that the penalty proceedings were validly initiated and that there was relevant material before the Tribunal to hold that the assessee had deliberately concealed the particulars of his income.

[x] The decision in Hindustan Steel Ltd. v. State of Orissa, reported in 83 ITR 26, which was a decision rendered in context of the penalty proceedings of the Orissa Sales Tax Act, was cited for relying upon the observations that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so.

[y] A decision of this Court in Commissioner of Income Tax v. Manu Engineering Works, reported in 122 ITR 306 was cited for the proposition that it is incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by him and if no such clear-cut finding is reached by the IAC, penalty cannot be levied.

[y-1] The provisions of sub-clause (iii) of section 271(1)(c), with which we are concerned in the present proceedings, were substituted with effect from 1-4-1976, while this decision related to the Assessment Year 1970-71 i.e. to a period prior to the aforesaid explanation coming into force.

[z] The decision in Commissioner of Income Tax v. Vegetable Products Ltd., reported in 88 ITR 192 was cited for the proposition that, where two reasonable constructions are possible, the one

favourable to the assessee must be followed, more particularly so where the provision relates to imposition of a penalty.

[aa] The decision of the Supreme Court in Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax, reported in 124 ITR 15 was cited for the proposition that omission to include in return of turnover the amount of freight included in the price under a bonafide belief that it was not taxable, cannot be said to be false.

[bb] The decision of the Punjab & Haryana High Court in Commissioner of Income Tax v. Firozepur Finance (P) Ltd. reported in 124 ITR 619 was cited for the proposition that if income does not result at all, there cannot be levy of tax. The Court followed the decision of the Supreme Court in C.I.T. v. Shoorji Vallabhdas & Co., reported in 46 ITR 144.

[cc] The decision of Patna High Court in Commissioner of Income Tax v. Lal Babu, reported in 122 ITR 1006 was cited for the proposition that if assessee gives a plausible explanation against the additions made to his income, the onus shifts to the department.

[dd] The decision of the Supreme Court in Commissioner of Income Tax v. Lakhdhir Lalji, reported in 85 ITR 77 was cited for the proposition that, where the very basis for the penalty proceedings against the assessee initiated by the Income Tax Officer disappeared when the Appellate Assistant Commissioner held that there was no suppression of income by the assessee, the IAC had no jurisdiction to impose penalty under section 271(1)(c) for concealment of income.

[ee] The decision of the Patna High Court in Commissioner of Income Tax v. Nipani Tobacco Stores, reported in 145 ITR 128 was cited for the proposition that the initial burden of proof which lay upon the assessee to prove a negative fact could be said to have been discharged by merely showing a preponderance of probabilities by the assessee.

[ff] The decision of this High Court in National Textiles v. Commissioner of Income Tax, reported

in 249 ITR 125 was cited for the proposition that, where the circumstances were equally consistent with the hypothesis that they could have been sundry loans of small amounts obtained from different parties, the imposition of penalty was not justified.

12. The learned counsel appearing for the Revenue submitted that, in view of the specific terms of the agreement and the deed of assignment, interest was payable on the deferred consideration amount from 1st March 1977 being the date of the transaction. It was submitted that since interest was to be charged on the amount outstanding from time to time, it became payable from 1-3-1977 being the date when the deferred consideration amount became outstanding. The learned counsel also argued that there was no commercial expediency for which the interest that had accrued could have been given up. It was pointed out that the unit and the business which were transferred by the assessee to its subsidiary Elscope Pvt. Ltd. with effect from 1-3-1977 under the agreement dated 28-2-1977 were in turn transferred by Elscope to its subsidiary Ambalal Sarabhai Enterprises Ltd. with effect from 1-7-1977, and that under the agreement between Elscope and ASE, the liabilities in respect of the transferred unit and business were taken over by ASE. There was also a stipulation in clause (4) of that agreement dated 28-6-1977 between Elscope and ASE that liability of Elscope to pay under the agreement under which it had purchased the unit and the business from the assessee, as it stood on 30th June 1977, was taken over by the ASE and if no claim was made in respect of such liability which was taken over, then ASE was to pay Elscope total value of such liabilities and such value was deemed to augment the purchase price payable by ASE to Elscope to be added prorata in the installments of the balance purchase price. It was also submitted that, under the deed of assignment dated 25-4-1978, it was stipulated between Elscope and ASE that the purchaser ASE would perform all contracts and agreements entered into by Elscope and the Elscope was discharged in respect of such liabilities. On the basis of these documents, the learned counsel for the revenue argued that the transaction between the assessee and Elscope was not a genuine transaction, but Elscope was only made a conduit pipe and merely a technical transfer was effected so that Elscope can in turn transfer its subsidiary the same unit and business and the result was arranged in such a way that Elscope would gain, which was the gain of the assessee itself, since it was the sole shareholder of Elscope.

12.1 It was further argued that the resolution dated 30th June 1978 of the assessee did not bring about any valid terms of contract, because, there was a counter proposal contained in that resolution that Elscope shall furnish security to the satisfaction of the assessee and to that counter proposal, no acceptance was sent by Elscope. Since there was no concluded contract on the aspect of the mode of payment, which was purported to be changed by the proposal dated 15-6-1978 and the resolution dated 30th June 1978, there was no effective substitution of the mode of payment which was stipulated in the agreement and the deed of assignment between these parties, as per which, the interest was to accrue from 1st March 1977 and therefore, during the accounting year, and it constituted part of the total income of the assessee during that year. It was submitted that since the resolution dated 30th June 1978 did not effectively change the mode of payment even for the year 1980-81, interest continued to accrue to the assessee under the existing mode of payment stipulated in the agreement and the deed of assignment. It was further contended that the resolution dated 30th June 1978 could not be given any retrospective effect because on the last date of the accounting year, the interest that had already accrued, could not have been affected by the said resolution. It was further pointed out that, in the proposal dated 15th June 1978 sent by Elscope to the assessee, the statement made to the effect that the mode of payment in respect of the transfer by Elscope to ASE was till under discussion between those parties was wrong, because, the deed of assignment between Elscope and ASE was already executed on 25-4-1978 in which all the terms including mode of payment were crystallized. It was also argued that there was no security furnished by Elscope to ASE as proposed by it and therefore, the change in mode of payment which was conditional upon furnishing such security by Elscope to the assessee did not operate and non-fullfillment of the condition of security, which was a part of the consideration, not being furnished, there was no effective change brought about in the existing mode of payment as per which interest was payable from 1-3-1977. It was also argued that there was no reason for the Elscope to make such proposal on 15-6-1978, because, ASE had already stepped into its shoes and was liable to the assessee in view of the fact that the liabilities were taken over by the ASE pursuant to the transfer of the same unit and business by Elscope to ASE with effect from 1-7-1977.

12.2 In context of the penalty proceedings under

section 271(1)(c) of the Act (Income Tax Reference No. 58 of 1993), the learned counsel for the revenue argued that, in the quantum proceedings, at no point of time, did the assessee claim that interest was to be charged from 1-7-1978 as per the resolution dated 25-2-1977 and the circular resolution dated 3-3-1977 passed by the assessee. It was argued that if the resolutions dated 28-2-1977 and 3-3-1977 really contained the date 1-7-1978 or were worded the way they now appear to be worded the date of 1-7-1978, could never have been missed in the supplemental agreement dated 4-3-1977 which was specifically entered into, in context of the interest payable by the vendee, since the stipulation was earlier left out in agreement dated 28-2-1977. It was submitted that since the resolution dated 30th June 1978 was not a genuine resolution, because, it was intended to evade tax and therefore, could not have been a bona fide act on the part of the assessee and that no charge was created pursuant to the security which was offered and further that, as there was incongruity in the stand before the quantum proceedings in which the date 1-7-1978 never occurred and the stand taken up in the penalty proceedings, in which it was suggested that the interest was to be charged from 1-7-1978 as per the resolutions dated 28-2-1997 and 3-3-1977, which date was shifted to 1-7-1979 as per the resolution dated 30-3-1978 and further because, there was collusion between the assessee and its subsidiary to make an arrangement which would have the effect of warding off the payment of tax by the assessee, it should be held that the penalty imposed on the assessee under section 271(1)(c) of the said Act was fully justified, and that there was no error committed by the Tribunal in that regard.

12.3 As regards the decision of the Tribunal deleting the levy of interest under section 215 of the Act in respect of the Assessment Year 1979-80 (Income Tax Reference No. 75 of 1987), the learned counsel argued that the Tribunal has, without there being any valid reason, set aside the levy of interest which was a corollary to the lapse committed by the assessee in respect of the Assessment Year 1979-80, for which it had filed a `Nil' estimate of advance tax pursuant to the notice which was sent under section 210 of the Act. It was submitted that the provisions of section 215 of the Act were automatically attracted to the facts of the case and the interest was, therefore, rightly charged under section 215 of the Act by the authorities below, and the Tribunal deleted the charge of interest under section 215 contrary to law.

12.4 As regards the penalty imposed under section 273(2)(a) of the said Act and confirmed by the Tribunal, which is the subject matter of Income Tax Reference No. 220 of 1995, the learned counsel supported the reasoning of the concerned authorities and the tribunal and submitted that the assessee had reason to believe that the estimate of advance tax filed by it in respect of the Assessment Year 1979-80 was untrue and that the Tribunal had not committed any error in reaching that finding.

13. In support of his contentions, the learned counsel for the revenue relied upon the following decisions :

[a] The decision in Commissioner of Income Tax v. Hindustan Motors Ltd., reported in 202 ITR 839 (Cal.) was cited for the proposition that accrual of interest takes place normally on day to day basis and even when there is no due date fixed for payment of interest, interest certainly accrues on the last day of the previous year. It was held that accrual of interest does not depend upon the making up of the accounts and that forgoing of interest after its accrual will not enable an assessee to claim that the same should not be included in the total income for the relevant year or that the amount should be allowed deduction as business expenditure.

[b] The decision in Commissioner of Income Tax v. Shiv Prakash Janak Raj & Co. Pvt. Ltd., reported in 222 ITR 583 was relied upon for the proposition that the concept of real income cannot be employed so as to defeat the provisions of the Act and the Rules. It was held that there was no contradiction or inconsistency between the decision in CIT v. Birla Gwalior (P) Ltd. [(1978) 89 ITR 266 (SC)] and Morvi Industries Ltd. v. CIT [(1971) 82 ITR 835 (SC)]. In the former case, the important fact found was that the money became due to the assessee not at the end of the accounting year, but on the date the managed company made up its accounts.

[c] The decision of this Court in Commissioner of Income Tax v. Gordhanbhai Jethabhai, reported in 205 ITR 279 was cited for its proposition that interest becomes payable by the assessee as a result of operation of law and it is not made dependent upon the discretion of the Income Tax Officer. It was held that the discretion which

is conferred upon the Income Tax Officer is not with respect to determination of payability of interest but with respect to reduction or waiver of interest payable by the assessee.

In this context, the learned counsel submitted that the reliance placed by the Tribunal on the decision of this court in Commissioner of Income Tax v. Bharat Machinery & Hardware Mart, reported in 136 ITR 875, was misconceived, because, that was a case under section 217 of the Act, and not under section 215, and that, on the facts of the case, the Court held that the ITO had misapplied the law in levying interest under section 217(1A), and that it was a case of error of law committed by the ITO capable of rectification under section 154. It was also submitted that the Court had in terms observed that there may be innumerable situations in which the assessee may be required to make an estimate as enjoined by section 212(2A) of the Act.

[d] The decision of the Supreme court in Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income Tax, reported in 160 ITR 961 was relied upon for its holding to the effect that interest levied under section 215 of the Act was by way of compensation for depriving the revenue of the benefit of the tax for the period during which it had remained unpaid, and that levy of interest is the part of the process of assessment. It was held that since the assessee had made no application for reduction or waiver of interest under section 215, no question arose of the relevant authority having denied improperly interest or waiver of interest.

[e] The decision of the Madras High Court in M.N.Kanagasabai Chettiar v. Commissioner of Income Tax, reported in 75 ITR 672 was cited for relying upon the observations to the effect that the company cannot, by a self-serving resolution of the board of directors, alter the situation and voluntarily give certain tax benefits to the assessee and gain certain advantages to itself under the guise and in the exercise of the indoor management of the company.

[f] The Supreme Court in Central Manganese case (supra) approved the decision of this Court in

Bhikhoobhai N. Shah v. Commissioner of Income Tax, reported in 114 ITR 197, in which it was held that, waiver or reduction of interest pre-supposses that liability has been incurred by the assessee, and that if no liability has been incurred, then there is no question of exercise of discretion of waiver or reduction of interest. It was also held that the assessee in an appeal against the order of assessment cannot question the interest assessed if he does not deny his liability to be assessed to such interest under section 215 of the Act.

[g] The decision in State Bank of Travancore v. Commissioner of Income Tax, reported in 158 ITR 102 was relied upon on behalf of the Revenue for the proposition that notion of real income cannot be brought into play where income has accrued according to the accounts of the assessee and there is no indication by the assessee treating the amount as not having accrued and that, once accrual takes place, the same cannot be defeated by any theory of real income. It was held that the concept of real income cannot be so used as to make accrued income non-income simply because after the event of accrual, the assessee neither decides to treat it as a bad debt nor claims deduction, but still enters the same with a diminished hope of recovery in the suspense account. Extension of the concept of real income to this field to negate accrual after the amount had become payable is contrary to the postulates of the Act.

[h] (i) The decision Chancery Division in Dickison (Inspector of Taxes) v. ABEL, reported in (1996) All E.R. 484 was cited for the proposition that a conditional promise made without valuable consideration was unforceable.

(ii) The decision of the House of Lords in Scammell v. Ousto, reported in (1941)1 All E.L.R. 14 was cited to point out that, in a case where the expression `on hire-purchase terms' was found to be too vague to be given any definite meaning, it was held that there was no concluded agreement.

(iii) The decision of the Chancery Division in

Myton Ltd. v. Schwab-Morris reported in (1974)1 All E.R. 326 was referred to point out that in a case where the condition precedent of making a deposit was not fulfilled, it was held that the plaintiff was not bound by the agreement.

(iv) The decision of the Court of Appeal in May And Butcher Ltd. v. The King, reported in (1934) 2 K.B. 17 was referred to for the proposition that it was well recognised principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined, is no contract at all.

[i] (i) The decision of the Supreme Court in Col. D.I. MacPherson v. M.N. Appanna, reported in AIR 1951 SC 184 was cited for the proposition that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at the price to the person making an enquiry. It was held that, as there was no express assent to the offer made by the plaintiff, there was no concluded contract.

(ii) The decision of the Supreme Court in M/s Zodiac Electrical Pvt. Ltd. v. Union of India, reported in AIR 1986 SC 1918 was cited for the proposition that, where the correspondence showed that no unqualified acceptance of the counter offer was made, there was no concluded contract between the parties.

(iii) The decision in M/s Rickmers Verwaltung Gimb H. v. Indian Oil Corporation Ltd., reported in AIR 1989 SC 504 was referred to for the proposition that, while deciding the question whether any agreement can be spelt out from the correspondence between the parties, the cardinal principle to remember is that it is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which would create a binding contract between them.

[j] The decision of the Kerala High Court in Anand Liquors v. Commissioner of Income Tax, reported in 232 ITR 35 was cited for the proposition that where there is an explanation and no material to substantiate or support it, the proviso to the Explanation 1 to section 271(1)(c) of the Act is attracted. It was held that the deeming provision of Explanation 1 would operate to conclude that the income had been concealed by the assessee.

[k] The decision of the Supreme Court in Gujarat Travancore Agency v. Commissioner of Income Tax, reported in 177 ITR 455 was cited for the proposition that there is nothing in section 271(1)(a) of the Act which requires that mens rea must be proved before penalty could be levied under that provision.

[I] INCOME TAX REFERENCE NO. 56 OF 1986 :

14. On the question whether interest accrued during the Accounting Year of 1-7-1977 to 30-6-1978, it would be appropriate to refer to the stipulations of the agreement and deed of assignment, which have bearing on the question of accrual of interest. By the agreement dated 28th February 1977 (Annexure `P' in ITR No. 56 of 1986), the assessee who held entire issue subscribed and paid up share capital of the vendee Elscope who was the purchaser as mentioned therein, agreed to transfer and assign to the purchaser its industrial undertaking and business of Sarabhai Chemicals Division and the business of Sarabhai Common Services Division as a going concern with effect from 1st March 1977. In paragraph 12 of the agreement, it was stipulated;

"On the first day of March 1977, the vendor shall, put the purchaser in full possession, custody and control of the said industrial undertaking ad the business of Sarabhai Chemicals Division and of the business of the said Sarabhai Common Services Division and the purchaser shall be deemed on and from 1st day of March 1977 to carry on the business of the Sarabhai Chemicals Division and Sarabhai Common Services Division as its own and for and on its own account without any reference or recourse whatsoever to the vendor".

In paragraph 3(b)(iii), the mode of payment of

the consideration amount for which the transfer was made was stipulated, which, to the extent that it relates to payment of interest, reads as under :

"The payment of moneys in the manner aforesaid on or before the stipulated dates shall be of the essence of the contract. Provided, however, that in case the purchaser fails to pay any instalment on the due date, then, in such event, notwithstanding and in addition to any other rights and remedies accruing or available to the vendor, the vendor shall be entitled to call upon the purchaser to pay interest at such rate as is equal to the rate of interest payable by the vendor to its bankers in the ordinary course of business from the due date of payment of the instalment until the date of actual payment thereof."

14.1 In context of the aforesaid agreement of 28-2-1977, the parties entered into a supplemental agreement on 4-3-1977, by which more elaborate provisions were made for payment of interest and as stipulated in paragraph 3 of the supplemental agreement, the amendments and modifications made by it in the principal agreement dated 28-2-1977 were to be deemed to have formed part of and incorporated in the principal agreement from the date of execution thereof. The parties agreed to the mode of payment of the consideration under the principal agreement as set out in this supplemental agreement and to the extent to which it has relevance on the aspect of payment of interest, the terms so substituted read as under :

"[D] The parties hereto declare, acknowledge and confirm that the proposal relating to payment of interest on the unpaid purchase price remaining outstanding from time to time was through oversight and accident not incorporated in the principal agreement. The parties hereto being the same as parties to the principal agreement desire expressly to incorporate and record the same in the said agreement for sale by executing this supplemental agreement for sale to the principal agreement dated the 28th day of February 1977.

[E] The parties hereto are also desirous of

varying and altering schedule for the payment of the purchase consideration as set out in the principal agreement in the manner herein provided and, accordingly the balance of the purchase price shall be payable as under :

Rs.2,00,00,000=00 payable as and when demanded by the vendor and shall carry interest at such rate as is equal to the rate of interest which the vendor pays to its bankers in the ordinary course of business.

(ii) The balance of the purchase price shall be paid by the purchaser to the vendor in eight equal installments, together with interest thereon at the rate hereinafter provided, the first of such installments shall be due and payable on the 1st October 1979 and each subsequent instalment shall be due and payable on the first day of October in each consecutive year as under :

12.1/2% to be paid on or before the 1-10-1979

xxxxxx
xxxxxx
xxxxxx

12.1/2% to be paid on or before the 1-10-1986

The purchaser shall pay simple interest at the rate of 11% per annum on the balance of the unpaid purchase consideration remaining outstanding from time to time and, if the purchaser commits ay default or delay in paying any installment or installments on the due date, the purchaser shall pay interest at such rate as is equal to the rate of interest which the vendor pays to its bankers in the ordinary course of business from the due date of payment of installment until the date of payment

thereof."

14.2 In the deed of assignment dated 28th June 1977, it was again reiterated that in light of the agreement dated 28th February 1977, the assessee had agreed to transfer and assign on and with effect from 1st day of March 1977 the industrial undertaking and business of its Sarabhai Chemical Division and the business of its Sarabhai Common Services Division as going concerns to Elscope pursuant to the supplemental agreement dated 4th March 1977, which was referred to in paragraph (Q). It was, inter alia, stated that the amount of Rs. 2 crore would be paid as and when demanded by the vendor `and will carry interest at the rate as is equal to the rate of interest which the vendor pays to its bankers in the ordinary course of business', and as regards the amount of Rs.4,54,18,760=89, it was provided that the said amount was payable as per the installments mentioned therein `and will carry interest at 11% per annum on the amount remaining outstanding from time to time'. It was further provided that :

"The payment of installments together with the interest at the rate of eleven percent per annum thereon in the manner and on the dates aforesaid shall be of the essence of the contract; provided however that in case the purchaser fails to pay any instalment on the due date then in such event, notwithstanding and in addition to any other rights and remedies accruing or available to the vendor, the vendor shall be entitled to call upon the purchaser to pay interest on such instalment at such rate as is equal to the rate of interest as payable by the vendor to its bankers in the ordinary course of business from the due date of payment of the instalment until the date of actual payment thereof."

14.3 It would be a trite thing to say that the terms of payment of interest which were binding on the parties were those which finally came to be incorporated in the deed of assignment. Payment of interest was treated as essence of the contract and as noted above. If the installments were not duly paid, the rate of interest was to be higher than 11% per annum and the vendee was in the event of default of payment of instalment bound to pay interest at the rate payable by the vendor to its bankers in the ordinary course of business. These terms regarding mode of payment were never disturbed until the last date of the accounting year ending on 30th June 1978 on which date the assessee passed the resolution dated

30th June 1978, by which it accepted the proposal of its subsidiary Elscope sent on 15th June 1978 and substituted the mode of payment by purporting to shift the date of charging of interest to 1-7-1979.

14.4 As noted above, in response to the inquiry from the ITO in the quantum proceedings, the assessee had produced letter dated 15th June 1978 of Elscope and its resolution dated 30th June 1978. In the letter dated 15th June 1978 (Annexure `F' in ITR No. 56 of 1986), the vendee, Elscope, referring to the deed of assignment dated 28th June 1977 and the deed of conveyance dated February 1978 in respect of movable and immovable properties respectively and to the terms stipulated for paying the consideration, proposed the method of payment of the balance of Rs.6,54,10,253=49, which remained outstanding by suggesting that Rs.1,84,10,253=49 out of the said amount will not carry any interest and will be paid as and when demanded by the assessee, while Rs.4.70 crores will be paid in five annual installments, first of which was to be made payable on 1st March 1987 with an option to the vendee to repay the sum on 1st March 1991 and that the said amount `shall carry simple interest at 11% per annum with effect from 1st July 1979'. It was further mentioned that the vendee i.e. Elscope had in the course of re-organisation of the business, transferred and assigned of its undertakings and business to ASE, and that the mode of payment of the purchase price and the question of security was still under consideration between them. It was then stated, "However, we confirm that we shall provide you the same security or security similar to the security as may be provided by Ambalal Sarabhai Enterprises Pvt. Ltd. in respect of deferred purchase consideration".

14.5 In the minutes dated 30th June 1978, after referring to the said proposal regarding revised mode of payment, it was, inter alia, resolved, " ..... the company hereby approve, accept and adopt the following revised mode of payment as contained in letter dated 15th June 1978 received from Elscope Pvt. Ltd. .....". Accordingly, it was resolved that the amount of Rs.1,84,10,253=45 will not carry any interest and that Rs.4.70 crores `shall carry simple interest at 11% per annum with effect from 1st July 1979 and the said amount will be secured to the satisfaction of the company'.

14.6 It will be seen from the above terms of the supplemental agreement as amending the principal agreement as well as the deed of assignment that the

transaction took place with effect from 1st March 1977 and the interest was to be charged on the amount outstanding from time to time. The obligation to pay interest was thus incorporated in the agreement and the deed of assignment in context of the transaction that took place with effect from 1-3-1977. The obligation to pay interest was not a separate debt, but the debt incurred under under the contract included the obligation to pay interest. To say that no date of accrual of interest was fixed in the contract is to misconstrue the provisions thereof despite the express stipulation about the obligation to pay interest which was to be treated as the essence of the contract. When no date is specified in a transaction, which incorporated an obligation of a party thereto to pay interest, it obviously would mean that the date from which the interest is to be paid would be the point of time from when the obligation to pay the outstanding amount starts, and that will be the date from which the creditor's entitlement to recover interest starts. Sale is performed when the seller of goods has transferred the property in the goods to the buyer for a price, with all significant risks and rewards of ownership and no effective control of the goods transferred is retained to a degree usually associated with ownership. A criteria for determining when to recognize revenue from a transaction involving sale of movables is the time when the seller has transferred the property in the goods to the buyer for consideration. The transfer of property in goods in most cases, results in or coincides with the transfer of significant risks and rewards of ownership to the buyer, unless otherwise stipulated by the parties.

14.7 Interest accrued in most circumstances on the time basis to be determined by the amount outstanding and the rate applicable. Recognition of revenue requires that the revenue is measurable, and that at the time of sale, it would not be unreasonable to accept ultimate collection. In the present case, in view of the categorical stipulation that interest will be payable on the deferred consideration amount in respect of the sale which became effective from 1st March 1977, the interest started accruing on that time basis from 1st March 1977 determined by the amount outstanding from time to time and the rate applicable which both were stipulated in clearest possible terms in the deed of assignment dated 28th June 1977 and the agreements which preceded it. That what already accrued during the Accounting Year from 1-7-1977 to 30-6-1978 could not be nullified by the resolution of 30th June 1978 said to have been passed at 2.00 p.m. on that day. As held by the Supreme court in

C.I.T. v. Shiv Prakash Janak Raj (supra), concept of real income cannot be employed so as to defeat the provisions of the Act and the Rules. In that case, it was held that the waiver of interest after the expiry of the relevant accounting year only meant that the assessee was giving up the money which had accrued to it. It cannot be said that the interest amount had not accrued to the assessee.

14.8 In State Bank of Travacore (supra), the Supreme Court held that the concept of real income could not be so read as to defeat the object and the provisions of the statutory enactment and it could not make accrued income non-income. The concept of real income would apply where there has been a surrender of income which in theory may have accrued but in the reality of the situation, no income had resulted because the income did not really accrue. In Shiv Prakash Janak Raj (supra), the Supreme Court reiterated that there is no room nor would it be permissible for the Court to import concept of real income so as to whittle down, qualify or defeat the provisions of the Act and the Rules.

14.9 In Hindustan Motors (supra), Calcutta High Court held that accrual of interest takes place normally on day to day basis and it does not depend upon the making of account. It was held that forgoing of interest after its accrual will not enable an assessee to claim that the same should not be included in the total income for the relevant year or that the amount should be allowed as deduction by way of business expenditure.

14.10 The interest on the deferred amount of consideration clearly accrued to the assessee in the instant case on the basis of the terms stipulated between the parties in the deed of assignment. Neither in the principal agreement or the supplemental agreement amending it nor in the deed of assignment dated 28th June 1977, the date of charging of interest was fixed as 1-7-1978. This date did not occur in any of the documents executed between the parties or in any of the correspondence addressed to the concerned income tax authorities during the proceedings despite the fact that the assessee was called upon to explain non-disclosure of the interest income. It was for the first time on 9th March 1988 that the resolution dated 25-2-1977 and the circular resolution dated 3-3-1977 surfaced when they were furnished with the assessee's reply dated 9th March 1988 in the penalty proceedings initiated against it under section 271(1)(c) of the Act. There was no whisper of these resolutions mentioning the date from which

interest was to be charged as 1-7-1978 made in any of the replies of the assessee sent on 29-12-1982, 26-6-1984 and 14-8-1985 to the showcause notice issued in the penalty proceedings. There is no explanation forthcoming to show why were these resolutions of 25-2-1977 and 3-3-1977 not produced in the quantum proceedings or thereafter in the penalty proceedings, if the date of 1-7-1978 was fixed in them as the date from which the interest was to be charged. In fact, as noted above, the supplemental agreement of 4-3-1977 was entered into between the parties specifically for incorporating interest clause and it would be too naive to assume that the company of the assessee's standing, assisted by its Chartered Accountants and Lawyers would through oversight not mentioned an important term of the date of charging of interest in the agreement and the deed of assignment and even thereafter, at any time, during the quantum proceedings or in any of the replies to the show cause notice in the penalty proceedings prior to 9th March 1988 when the assessee suddenly came up with the idea that the resolutions dated 25th February 1977 and 3rd March 1977 should come to their rescue. There is, therefore, absolutely no substance in the contention that the interest did not accrue to the assessee during the Accounting Year 1-7-1977 to 30-6-1978.

15. The only question that now remains to be examined is whether the interest that had accrued and which the assessee did not in fact receive was given up for any commercial expediency after it had accrued upto 30th June 1978, as pleaded in the alternative on behalf of the assessee on the basis of the resolution dated 30th June 1978. The ground of commercial expediency put forth was that the debt which had not been secured was now secured. In the proposal dated 15th June 1978 sent by the assessee's subsidiary Elscope which had purchased its undertaking, while proposing modification in the terms of the deed of assignment dated 28th June 1977, the vendee had suggested modification of the method of payment of the balance amount of Rs.6,54,10,253=49, as narrated above and suggesting that the amount which was payable on demand will not carry any interest while the amount which was to be paid by installments will carry simple interest at 11% per annum with effect from 1st July 1979 on the amount remaining outstanding from time to time. It will be noted that the last mentioned words purported to have been quoted from the deed of assignment in the letter dated 15th June 1978 to the effect that, "continue as unsecured deferred consideration" were not there in the deed of assignment, nor were they incorporated in the supplemental agreement dated 4th March 1977 substituting

the mode of payment originally stipulated in the agreement dated 28-2-1977. At the end of the proposal of the vendee, it was mentioned that "mode of payment of the purchase price and the question of security is still under discussion between our company and Ambalal Sarabhai Enterprises Pvt. Ltd." to whom the business purchased by this subsidiary from the assessee, was transferred. The vendee wrote "We confirm that we shall provide you the same security or securities similar to the security as may be provided by Ambalal Sarabhai Enterprises Pvt. Ltd. in respect of the deferred purchase consideration". Admittedly, the vendee had already executed the deed of assignment on 25th April 1978, in favour of the ASE for the assets which included the asset purchased by Elscope from the assessee, under which the mode of payment between the two was finally settled. Therefore, the proposal was made in the letter dated 15th June 1978 of the vendee on a statement namely, "mode of payment of purchase price and question of security is still under discussion between our company and Ambalal Sarabhai Enterprise Pvt. Ltd." which was not correct. The assessee readily obliged its subsidiary Elscope by accepting the said proposal of shifting the date of accrual of interest to 1st July 1979, and though no concrete proposal of security was made, by simply stating that "the said amount will be secured to the satisfaction of the (assessee) company". Admittedly, no security passed. The Commissioner of Income Tax (Appeals) has admirably discussed this aspect in paragraph 15 of his order, exposing the hollowness of the assessee's stand that it secured bonds of ASE, in the following words :

"It was contended that since the Bonds themselves were secured on the assets of ASE Pvt. Ltd., it should be viewed as security furnished by the EPL for the unpaid purchase price payable to the appellant company. The appellant has gone to the extent of saying that the debt itself was satisfied (refer para marked 1 of the appellant's submissions starting towards the middle of page 3 of the appellant's letter dated 6-1-1984) by passing on the said secured Bonds. These bonds carried interest of 11% and they were redeemable in 1991 or subject to some other conditions i 1987. They were marketable but since they carried interest at 11% only and they were not redeemable before 1987, the market price quoted was about 2/3rd of the face value. So, i the process, the appellant company has accepted assets worth 2/3rd of the market price while actually as per the original agreement, the

> installments would have started in October 1979 and ended in October 1986 against which as per revised terms suggested in June 1978, the installments would have started falling due from 1987 only. Apart from postponement by about eight years, it is obvious that there was no security worth the name actually given by EPL for making payments in cash and what was actually given was Bonds whose market price was 2/3rd of its face value. All these concessions are given to EPL just like that, and for no real consideration."

15.1 It is clear that the last minute arrangement to ward off the payment of tax on the interest income that had accrued to the assessee during the entire Accounting Year 1-7-1977 to 30th June 1978 (till the moment the resolution dated 30th June 1978 was passed at 2.00 p.m.) was made by creating a ground of commercial expediency of getting the debt secured. In fact and reality, neither was there any particular security offered in the proposal nor was there any acceptance of security. A ghost was created to hide the real object of modification of the mode of payment which was to ward off the payment of tax on interest income that already had accrued to the assessee. The contention that there was no loss to the revenue by relinquishing the accrual, because, if interest were accepted, the assessee on one hand would have paid tax while on the other, the vendee would have claimed deduction on interest paid, is wholly besides the point. The vendee was a loss making company and if in principle, such escape route is accepted to be valid, it would be very easy to dodge payment of tax on the accrued interest by effecting such waiver in favour of the wholly owned subsidiary which may be incurring losses. The waiver of accrued interest for commercial expediency cannot be confused with the last minute device adopted for evasion of tax. The arrangement made on 30th June 1978 was clearly a subterfuge aimed at shifting the profits which would have shown due to the accrual of interest. The resultant benefit to the wholly owned company Elscope Pvt. Ltd. remained assessee's own benefit, because, it was the sole shareholder of the vendee company. Commercial expediency must be viewed in the light of the requirements of the business and the actual services rendered, facilities given, the legitimate needs of the business met or other benefit to the business derived by the assessee, for which the claim is relinquished. Any fanciful or abstract consideration of commercial expediency is out of place in context of allowance of expenses incurred wholly and exclusively for

the purposes of business under section 37 of the Act. Whether the expenditure was incurred out of commercial expediency or not can be judged on objective standards such as, the nature of business, the terms and conditions of agreement or contract having bearing on the expenditure, the purpose for which the expenditure is incurred by payment or by adopting the mode of relinquishment of the accrued amount and whether the expenditure so incurred was meant to serve, promote or increase commercial activity or business of the assessee. In the present case, there was, if at all, commercial inexpediency in giving up the accrued interest, because, there was no valid justification to relinquish it from the assessee's business point of view. The only aim was to avoid payment of tax which had become due on the basis of accrual of interest and commercial expediency is only a dignified garb in which arrangement calculated to evade tax is sought to be covered. We have no hesitation in holding that the Tribunal, Commissioner of Income Tax (Appeals) and the Income Tax Officer have, for very valid reasons, rejected the claim of the assessee that the interest did not accrue during the accounting year due to the resolution dated 30th June 1978 and that if accrued, it was given up due to any commercial expediency.

16. The Tribunal was, therefore, right in holding that the interest amount of Rs.66,29,236=00 was liable to tax on accrual basis for the Assessment Year 1979 - 80, and that interest had accrued as a result of the supplemental agreement and the deed of assignment on day to day basis and was exigible to tax. The Tribunal was right in rejecting the contention that there was commercial expediency for giving up the accrued interest. The questions No. 1, 2 and 3 of Income Tax Reference No. 56 of 1986 are, therefore, answered in the affirmative, in favour of the revenue and against the assessee.

16.1 There was no challenge levelled against the resolution dated 30th June 1978 on the ground that it was not a genuine resolution. Law permits the contracting parties to lawfully change their stipulations by mutual agreement and therefore, the assessee and the vendee had no legal impediment in modifying the terms of their contract. The resolution dated 30th June 1978 accepted the proposal of the vendee as contained in the letter dated 15th June 1978, as is clear from the following words :-

"The company hereby approve, accept and adopt the following revised mode of payment as contained in

the letter No. Elscope / MC dated 15th June 1978 received from Elscope Pvt. Ltd."

Though the resolution by which it was agreed that the amount of Rs.1,84,10,253=49 will not carry any interest, and that Rs.4.70 crores payable in five equal installments shall carry simple interest at 11% per annum w.e.f. 1-7-1979, could not be given any retrospective effect so as to facilitate evasion of the tax liability that already had arisen for the Assessment Year 1979-80, it being a valid stipulation, changed the mode of payment from the date of the resolution and therefore, under the changed mode of payment adopted under it, no interest was to accrue during the accounting period from 1-7-1978 upto 30th June 1979 i.e. before 1-7-1979 as per the new stipulation and therefore, the reasoning of the Tribunal on that count appears to be correct as regards the Assessment Year 1980-81. Since no interest accrued in the Accounting Year 1-7-1978 to 30-6-1979, there could arise no question of relinquishment of interest for any commercial expediency, because, you cannot relinquish income that has not accrued at all. The questions No. 1 and 2 for the Assessment Year 1980-81 raised at the instance of the revenue in Income Tax Reference No. 56 of 1986 are, therefore, answered accordingly, against the revenue and in favour of the assessee.

16.2 The Reference No.56 of 1986 stands disposed of in terms of the above answers to Questions Nos. 1, 2 and 3 for the Assessment Year 1979-80 and to Questions Nos. 1 and 2 for the Assessment Year 1980-81 with no order as to costs.

[II] INCOME TAX REFERENCE NO. 75 OF 1987 ::

17. The counsel appearing for the Revenue contended in Reference No. 75 of 1987 that the Tribunal has committed gross error in deleting the interest levied under section 215 of the Act in respect of the interest income added for the Assessment Year 1979 - 80 on the ground that the assessee could not have predicted the assessment based on estimate of total income and the question of determining accrual of income is a highly complex issue. It was contended that the levy of interest under section 215(1) upon the amount by which the advance tax paid fall short of the assessed tax was automatic and that in the present case, in view of the stipulation to pay interest, it could not be said that the assessee could not have predicted accrual of interest. The Tribunal relying upon the decision of the Gujarat High Court in Commissioner of Income Tax v. Bharat Machinery & Hardware Mart, reported in 136 ITR 876

set aside the levy of interest under section 215 of the Act.

17.1 The learned counsel for the assessee, supporting the reasoning of the Tribunal, contended that even if `Nil' estimate was filed and `Nil' advance tax paid, it would be treated as if no estimate was filed and would attract the provisions of section 217 of the Act and not section 215 of the Act invoked by the Taxing Authorities and the Tribunal. Moreover, the assessee could not have estimated the advance tax due to complexity in deciding the issue of accrual of interest.

17.2 As per the provisions of section 215 of the Act, as it stood at the relevant time, it was obligatory on the part of the assessee under section 209A which was then operative, to send an estimate of current income under section 209A (2) (i) of the Act, if the current income of the assessee was likely to be less than the income on which advance tax was payable by him under section 209A (2)(i) of the Act. If, by an order under section 210 as it was operative at the relevant time, the assessee was required to pay advance tax, he had an option to send an estimate of current income by reason of his current income being likely to be less than the income on which the advance tax payable by him under section 210 had been computed. Thus, the assessee was required to furnish estimate of his current income, if according to him, his income was likely to be less than the advance tax payable under section 209A (1) as contemplated by section 209A(2) and had an option to do so when called upon to pay advance tax by virtue of section 210 as contemplated by section 212 of the Act.

17.3 I n the present case, the assessee never filed any estimate of advance tax until the order under section 210 of the Act was issued on it, requiring it to pay advance tax and a notice of demand was sent on it on 17-10-1978, by which it was required to pay Rs.1,22,22,757=00 and subsequent notice also under section 210 of the Act served on it on 8-12-1978 for the revised advance tax of Rs.1,28,74,172=00. Thereafter, the assessee filed its estimate of `Nil' advance tax in Form No. 29 on 14-12-1978. In pursuance of the `Nil' estimate, advance tax paid also was `Nil'. Therefore, this was not a case where the assessee had sent no estimate which would be governed by section 217(1) of the Act. The ITO completed the assessment by order dated 20th September 1982 by which it was ordered to charge interest under section 215 of the Act and an amount of Rs.19,30,364=00 was added in the tax calculation.

17.4 There is no substance in the contention that the ITO could not have ordered to charge interest under section 215 of the Act when the draft order mentioned section 217 and no directions were issued by the IAC under section 144B of the Act to change that to section 215. The IAC by his order dated 18-9-1982 did not issue any direction on the initiation of proceedings under various provisions pursuant to the proposed assessment order. Section 144B of the Act, as it existed at the relevant time, provided for reference to the IAC in certain cases when the ITO proposed to make any variation in the income or loss returned, which would be prejudicial to the assessee. The assessee forwards his objections to such variations. The IAC then issues directions for the guidance of the assessee under section 144B (4) which were binding on the ITO. The IAC had confined his directions to the matters falling within his jurisdiction which had bearing on the proposed variation in the income returned and made it clear that he was not issuing any directions in respect of initiation of proceedings on completion of the assessment by the ITO. Therefore, there is no substance in the contention, which was not even raised before the Tribunal, that the ITO's final assessment charging interest under section 215 of the Act was against the directions of the IAC or without jurisdiction. It was perfectly within the jurisdiction of the ITO to charge interest under section 215 and add the tax amount worked out, on the facts, in the tax computation.

17.5 The provisions of section 215, to the extent they are relevant for this case, were as follows :

"215. (1) Where, in any financial year, an assessee has paid advance tax under section 209A or section 212 on the basis of his own estimate (including revised estimate), and the advance tax so paid is less than seventy-five per cent of the assessed tax, simple interest at the rate of twelve per cent per annum from the 1st day of April next following the said financial year upto the date of the regular assessment shall be payable by the assessee upon the amount by which the advance tax so paid falls short of the assessed tax.

(2) xxxxx

(3) xxxxx

(4) In such cases and under such circumstances as may be prescribed, the Income Tax Officer may reduce or waive the interest payable by the assessee under this section.

(5) xxxxx

17.6 It will be noticed from the wordings of section 215(1) that simple interest at the rate of 12% per annum from 1st day of April next following the financial year in which advance less than 75% of the assessed tax was paid, upto the date of regular assessment "shall be payable" by the assessee upon the amount by which the advance tax paid fell short of the assessed tax. The words "shall be payable" bring about the statutory liability to pay such interest as a direct consequence of non-payment of advance tax as stipulated in this provision. Under sub-section (4) of section 215 of the Act, the ITO in cases and under circumstances as were prescribed by the Rules (Rule 40), was empowered to "reduce or waive the interest payable by the assessee under this section". These words also indicate that the liability to pay interest statutorily arises under section 215(1) when the assessee has paid less advance tax as contemplated by that provision. The rationale behind this provision is obvious. The amount of tax found payable on regular assessment not having been paid earlier as contemplated by law was retained by the assessee and to that extent, the State coffers suffered. Interest was, therefore, required to be levied by way of compensation. Once the interest became payable by virtue of the operation of section 215(1), it would become open to the assessee to apply to the ITO after such order is made to show that a reduction or waiver of interest is justified under Rule 40. (See Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income Tax, reported in (1986) 3 SCC 461).

17.7 The provision of section 18A(6) of the Income Tax Act of 1922 as originally enacted and which corresponded to section 215(1) of the Act of 1961 left no discretion to the ITO and if the estimate fell below the prescribed limit, the ITO was obliged to direct payment of interest as held by the Supreme Court in the constitution bench decision in I.S.A.L. Narayan Row v. Ishwarlal Bhagwandas, reported in AIR 1965 SC 1818 (See paragraph 17 of the judgement). Fifth proviso was added to sub-section (6) of section 18 retrospectively from 1-4-1952 by reason of which, ITO was invested with the discretion to reduce or waive interest payable by the assessee, as is provided for in sub-section (4) of

section 215 of the Act of 1961 read with Rule 40. It was held in paragraph 18 of the judgement that there was at the date of the original assessment an absolute obligation imposed upon the assessee to pay interest under section 18-A (6), but by reason of the retrospective operation given to the fifth proviso added to sub-section (6) by Act 25 of 1953, the Income Tax Officer was invested with the discretion to reduce or waive interest payable by the assessee and this power the income tax officer must, in view of the retrospective amendment, be deemed in law to have possessed on the date on which the order of assessment was made in this case. It was also held that his power to reduce or waive interest could be exercised only in prescribed cases within the limits of the authority conferred upon him. Thus, the obligation to pay interest flows from section 215(1) and it did not depend upon any other factor beyond those specifically recognised by section 215(1). The CIT (Appeals) had given very cogent reasons for upholding the levy of interest in paragraphs 24 and 25 of his order dated 29-2-1984 and the Tribunal has, for no valid reason, taken a different view and curiously brushed aside the addition on account of interest in computation of tax, which clearly became payable under section 215(1) on the established facts of the case.

17.8 Reliance placed by the Tribunal and on behalf of the assessee on the decision of this Court in Commissioner of Income tax v. Bharat Machinery & Hardware Mart, reported in 136 ITR (Guj) 875, is wholly misconceived in the context of the facts of the case. That was a case falling under section 217 (1A) of the Act and it was held that the question of the assessee being required to make an estimate of current income for the purpose of advance tax under section 212(3A) of the Act of 1961, could arise only if he could reasonably be attributed with the knowledge that his current income was likely to be greater than the income on which the advance tax was payable under section 210. In that case, there was a discrepancy between the income returned by the assessee and the income as assessed by the ITO, and the tax payable exceeded the advance tax by more than 33.1/2 per cent. The discrepancy had arisen by reason of the fact that the assessee had submitted his return on the basis of the income as disclosed by the books of account maintained by him, but the ITO did not accept the correctness of the books of account and acting under section 145(1) made an estimate of the gross profits on the basis of 18% of the total sales and it was not shown that in prior years, the assessment was made by estimate of gross profits. In the background of those facts, the

Court held that since difference between the returned income and the assessed income had arisen due to addition made by the ITO by an estimate of the gross profit under the direction of section 145(1), no interest could be charged under section 217 (1A) for failure of the assessee to file an estimate under section 212 (3A) and that the ITO had misapplied law in levying interest under section 217 (1A) and that it was a clear case of error of law committed by the ITO capable of rectification under section 154 of the Act. In the process, the Court clearly observed that, "In a given set of facts, an assessee may be expected to anticipate on his own even in regard to the estimate which the ITO might make in exercise of the powers under the proviso to section 145(1) of the Act in light of past experience". It was in terms observed, as noted above that, there may be innumerable situations in which the assessee may be required to make an estimate.

17.9 The decision of the Supreme Court in Central Provinces Manganese Ore Co. Ltd. (supra) was applied by the Division Bench of this Court in Commissioner of Income Tax v. Gordhanbhai Jethabhai, reported in 205 ITR 279, in which while construing the provisions of section 215, the Court in terms held that interest becomes payable by the assessee under that provision as a result of operation of law and it is not made dependent upon the discretion of the Income Tax Officer. The discretion which is conferred upon the Income Tax Officer is not with respect to determination of payability of interest but with respect to reduction or waiver of interest payable by the assessee. While deciding whether interest under section 215(1) is payable by the assessee or not, what the Income Tax Officer has to consider is whether the required conditions are satisfied or not, and at this stage, he is under no obligation to consider whether interest should be reduced or waived, which question would arise after the aspect of payability of interest is determined. The point of time when the ITO has to decide whether to reduce or waive the interest would be subsequent.

17.10 The Supreme Court in Central Provinces Manganese Ore Co. Ltd. (supra), approved the decision of the Karnataka High Court in National Products v. C.I.T. reported in 108 ITR 935 and the decision of the Gujarat High Court in Bhikhoobhai N. Shah v. Commissioner of Income Tax, reported in 114 ITR 197, in which, referring to the legal position laid down in National Products v. C.I.T. (supra), it was held that waiver or reduction of interest pre-supposes that the liability has been

incurred by the assessee and that if no liability was incurred, then there was no question of exercise of discretion of waiver or reduction of interest.

17.11 For the foregoing reasons, we hold that the Tribunal has erred in law in holding that the charge of interest under section 215 was not justified in the instant case. The question referred to this Court in Income Tax Reference No. 75 of 1987 is, therefore, answered accordingly in favour of the revenue and against the assessee. The reference stands disposed of accordingly with no order as to costs.

III. INCOME TAX REFERENCE NO. 220 OF 1995 :

18. This takes us to Income Tax Reference No. 220 of 1995 in which the assessee challenges the Tribunal's order confirming the penalty of Rs.4 lakhs levied under section 273(2)(a) of the Act. It was argued by the learned counsel for the assessee that the imposition of this penalty was not justified, because, it cannot be said that the assessee had reason to believe that the estimate of advance tax filed by it was untrue. It was also contended that penalties levied under section 273(2)(a) were determined in cases of two companies of the same group Fabriquip Pvt. Ltd. and Packart Pvt. Ltd. in the Assessment Year 1980-81, because, it was held in similar circumstances that the resolution passed on 30th June 1978 for forgoing interest had become applicable from 1-7-1978.

18.1 The learned counsel for the Revenue on the other hand supported the decision of the Tribunal and the authorities below it and argued that, in view of the agreement dated 28-2-1977 as modified by the supplementary agreement dated 4th March 1977 and the deed of assignment dated 28-6-1977, the assessee knew or had reason to believe that the `Nil' estimate of advance tax filed by it was wrong.

18.2 The authorities and the Tribunal have held that, while filing the `Nil' estimate of advance tax on 14-12-1978, the appellant had full knowledge of the interest income of Rs.66,29,236=00 which had accrued knowing or having reason to believe that `Nil' estimate was untrue, it had filed the same.

18.3 There can be no dispute about the fact that the levy of interest under section 215 and levy of penalty under section 273(2)(a) of the Act stand on different footings. While former emanates as a statutory

consequence under section 215(1), the later requires, by virtue of its quasi-criminal nature, that it should be proved that the assessee knew or had a reason to believe that the estimate was untrue. The word `untrue' means that what is not true; and true in the context would mean that what is in accordance with fact or reality and is genuine i.e. not spurious. Therefore, the revenue has to establish under section 273(2)(a) that the assessee when it filed the `Nil' estimate knew or had reason to believe that it was not genuine and was spurious. Such mental state of the assessee can be inferred from the relevant objective facts. In the present case, the resolution of 30th June 1978 was never doubted by the authorities to be spurious and under that resolution, the date of accrual of interest was shifted to 1st July 1979 by substituting the mode of payment as was incorporated in the agreement and the deed of assignment. The `Nil' estimate was filed on 14-12-1978, much after the said resolution was passed. In the background of the said resolution, by which the assessee intended to shift the date of accrual of interest to 1-7-1979, it is difficult to accept that the assessee had reason to believe that the `Nil' estimate was untrue. The possibility that the assessee reasonably believed that, in view of the resolution dated 30th June 1978, it could legitimately file `Nil' estimate, cannot be ruled out. In view of the nature of the change in the stipulation of mode of payment made by the resolution dated 30th June 1978, no definite conclusion can be drawn that the assessee had reason to believe that the `Nil' estimate filed by it was untrue. Merely because on assessment, the assessee's stand that the resolution which was passed on the last day of its Accounting Year i.e. on 30th June 1978 was not accepted on the ground that the interest that had already accrued during the Accounting Year on the strength of the contractual terms cannot be made `not to accrue after its actual accrual, it cannot be inferred with any certainty that the assessee had reason to believe that its `Nil' estimate was untrue. The penalty under section 273(2)(a) is not an automatic outcome of the addition of such income. The imposition of penalty under section 273(2)(a) was, therefore, not justified in the present case and therefore, the Tribunal was not justified in law in confirming the penalty of Rs.4 lakhs levied under section 273(2)(a) of the Act on the assessee.

18.4 The question referred to this Court in Income Tax Reference No. 220 of 1995 is, therefore, answered in the negative in favour of the assessee and against the revenue. The reference stands disposed of accordingly

with no order as to costs.

IV. INCOME TAX REFERENCE NO. 58 OF 1993 :

19. We now proceed to consider the question referred to this Court in Income Tax Reference No. 58 of 1993 arising from the order of the Tribunal, confirming the penalty of Rs.55 lakhs levied on the assessee under section 271(1)(c) of the Act.

19.1 The provisions of section 271(1)(c) of the Act, as they were operative at the relevant time, read as under:-

"Failure to furnish returns, comply with notices, concealment of income etc.

271. (1) If the Income Tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person -

(a) xxxxx

(b) xxxxx

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty -

(i) xxxxx

(ii) xxxxx

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income :

Provided that, if in a case falling under clause (c), the amount of income (as determined by the Income Tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished

exceeds a sum of twenty-five thousand rupees, the Income Tax Officer shall not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner.

Explanation 1 : Where in respect of any facts material to the computation of the total income of any person under this Act, -

(A) such person fails to offer an explanation or offers an explanation which is found by the Income Tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) to be false, or

(B) such person offers an explanation which he is not able to substantiate,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed :

Provided that nothing contained in this Explanation shall apply to a case referred to in clause (B) in respect of any amount added or disallowed as a result of the rejection of any explanation offered by such person, if such explanation is bonafide and all the facts relating to the same and material to the computation of his total income have been disclosed by him.

19.2 The satisfaction in the course of assessment proceedings that any person has concealed the particulars of his income or furnished inaccurate particulars of his income may give rise to a liability to pay penalty as provided by section 271(1)(c)(iii) of the Act. Accordingly, in addition to any tax payable by him, a sum `which shall not be less than, but which shall not exceed twice the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income'. Explanation 1 to section 271(1)(c)(iii) raises a presumption in cases where such person (a) fails to offer an explanation or offers an explanation which is found by the Income Tax Officer or the Appellate Assistant Commissioner or C.I.T. (Appeals) to be false, or (b)

offers an explanation which he is not able to substantiate, in respect of any facts material to the computation of the total income of such person. This presumption is to the effect that the amount added or disallowed in computing the total income by the ITO, AAC or CIT (Appeals) in the quantum proceedings shall be deemed to represent the income in respect of which particulars have been concealed. By its very nature, the expression `fails to offer an explanation' or `offers an explanation which is found by the ITO or AAC or the Commissioner (Appeals) to be false' occurring in sub-clause (A) of Explanation 1 to clause (iii) of section 271(1)(c) refers to the quantum proceedings. Therefore, the cases where no explanation was given in respect of any facts material to the computation of total income in respect of the amount added or disallowed therein or the explanation given in respect thereof was already found in such assessment proceedings to be false, there would arise a presumption that particulars of such added or disallowed income were concealed. In such cases falling under sub-clause (A) of Explanation 1, there can arise no question allowing the assessee to urge that he bonafide believe in the explanation which was proved to be false or which never was given, for, one cannot be said to have a reasonable bonafide belief in an explanation which never was given or an explanation proved to be false.

19.3 However, in cases where the explanation offered by such person in the quantum proceedings could not be substantiated by him in those proceedings, as a result of which, the amount was added or disallowed in computing the total income of such person by the ITO, AAC or the Commissioner (Appeals) before whom the explanation given could not be substantiated as contemplated by sub-clause (B) to Explanation I. The deeming fiction that the added / disallowed amounts represent the income in respect of which particulars have been concealed contained in Explanation 1 will not apply if the explanation that was given by the assessee in the quantum proceedings which he could not substantiate in those proceedings was (i) bonafide and, (ii) if he had disclosed all the facts relating to the same and material to the computation of his total income.

19.4 Penalty proceedings which are an aftermath of the quantum proceedings are not devised to undo the findings reached in the quantum proceedings. They are in continuity of the outcome of the quantum proceedings. If the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income, which

is added or allowed in the quantum proceedings, there still would remain to be considered the question as to the nature and circumstances of concealment and the penalty that may be imposed on him when the requisite satisfaction is reached by the ITO, AAC or Commissioner (Appeals), and that is why, the show cause notice for the penalty proceedings comes to be issued under section 271(1) after reaching the requisite satisfaction. In a large umber of cases where the assessee was not able to substantiate the explanation in respect of the income and by rejecting his explanation, the ITO, AAC and/or Commissioner (Appeals) added or disallowed the amount in computing the total income and it is not a case of `no explanation' or an explanation already found to be false by the ITO, AAC or the Commissioner (Appeals) as contemplated by clause (B) of Explanation 1, then there still remains a scope to examine the bonafides of the explanation already given by the assessee in the quantum proceedings. The rationale behind not giving similar consideration to cases falling in sub-clause (A) of Explanation 1 to a person who `fails to offer a explanation before the ITO during the proceedings' appears to be the legal assumption underlying the provision that in fact, there existed no explanation which could have been offered and to rule out any possibility of bringing into existence, explanations which in fact were not there. In cases where explanation was offered, but was rejected as it could not be substantiated by the assessee, there would arise no presumption of concealment of the particulars of income that was added or disallowed and such assessee can show that the said explanation offered by him was a bonafide one ad that he had disclosed all facts relating to such explanation ad material to the computation of his total income during the quantum proceedings.

19.5 The learned counsel for the assessee has contended that there was no concealment of particulars of income by the assessee nor did it furnish inaccurate particulars and therefore, the notice under section 271(1)(c) was issued without any basis. He submitted that the assessee had in the quantum proceedings taken up the stand that there did not accrue any interest in view of the fact that under the proposal of Elscope made in their letter dated 15th June 1978 and the resolution dated 30th June 1978, which was passed by the assessee accepting that proposal, interest was to be charged only from 1st July 1979 and the earlier mode of payment under the agreement and deed of assignment was substituted. He heavily relied upon the draft assessment order for the year 1979-80 prepared by the I.T.O. under section 143(3)

read with section 144-B of the Act to contend that it was disclosed during the quantum proceedings as stated in that order that the assessee had not received any interest from Elscope to whom the undertaking and business were transferred, and that interest was payable only from 1st July 1979 on the deferred payment. As recorded in the draft order, it was noticed that, in the return, no interest was shown as received or receivable by the assessee. The assessee was therefore asked to showcause why interest on accrual basis be not taxed on the amount due from Elscope as the outstanding purchase consideration. In the letter dated 16th September 1981, referred to in para 10 of the draft order, an explanation was given by the assessee that no interest had been charged pursuant to the revised mode of payment on the outstanding amount for the year in question ended on 30th June 1978. Extracts from the minutes of the meeting of the Board of Directors held on 30th June 1978 were filed. The assessee wrote another letter on 21-1-1982 explaining the reasons as to why interest should not be taxed in its hands. It was contended that the interest cannot be taxed on hypothetical basis. The stand of the assessee was that though it followed the mercantile system of accounting, when the assessee did not actually receive any interest, nor did it make any entry in respect thereof, it could not be said that interest had accrued on the last day of the accounting year ending on 30th June 1978. The assessee relied upon the decision of the Punjab High Court in Shiv Prakash Janak Raj (supra) which was later reversed by the Supreme Court as reported in 222 ITR 583).

19.6 Before the IAC to whom the draft assessment order was forwarded, the assessee had raised an objection challenging the findings of the ITO on the ground that the original agreement under which interest was receivable by the assessee was revised on 30th June 1978. The IAC rejected the contention and held that since the right to interest did accrue to the assessee by virtue of the deed of assignment dated 28-6-1977, the right to receive interest existed till 30th June 1978, on which the previous year of the assessee ended and that mere passing of the resolution on such last day pursuant to the request of the purchaser not to charge interest was nothing but relinquishment of the right without any consideration or business expediency. In appeal, the Commissioner (Appeals) held that the assessee was a sole shareholder of the transferee Elscope and by forgoing interest of Rs.1.20 crores for two years without any business expediency, it had benefited itself by a self-serving resolution of 30th June 1978 which had no

business expediency behind it. The assessee in its letter dated 6th January 1984 tried to explain that the secured bonds were furnished and those should be viewed as security furnished by the Elscope for the unpaid purchase price to the assessee, and that, in fact the debt itself was satisfied.

19.7 The contention raised on behalf of the assessee is that the above explanation offered by the assessee in the quantum proceedings that the interest did not accrue to it in the Accounting Year of 1-7-1977 to 30-6-1978 (Assessment Year 1979-80) in view of the resolution dated 30th June 1978 was a bonafide explanation which could not be substantiated in the quantum proceedings. As per the terms of assignment as modified by the resolution dated 30th June 1978, according to the belief of the assessee, the interest was to accrue on the deferred consideration amount only from 1-7-1979. In the penalty proceedings, additional material in form of two resolutions dated 25th February 1977 and 3rd March 1977 was relied upon to show that even earlier, it was resolved that interest was to accrue from 1-7-1978 which date was changed to 1-7-1979 by the resolution of 30th June 1978. It was argued that all the facts relating to the explanation and material to the computation of income were disclosed in the quantum proceedings and thereafter, in the penalty proceedings by showing additional material, the assessee had show that the explanation which he gave about the interest accruing only from 1-7-1977 was a bonafide one though not accepted upto the Tribunal level in the quantum proceedings. The presumption under Explanation 1 therefore, according to the learned counsel for the assessee, stood rebutted and the onus was now on the Department to prove that the assessee had concealed material particulars.

19.8 The learned counsel for the revenue supporting the reasoning of the Tribunal confirming the penalty, contended that passing of the resolution dated 30th June 1978 was itself a malafide device to evade tax and therefore, there could not be any bonafide belief on the part of the assessee on the basis of such resolution. Moreover, resolution was passed on the last day of the Accounting Year which shows that the arrangement was made with a view to evade the tax. He submitted that initiation of the proposal dated 15th June 1978 and the passing of the resolution dated 30th June 1978 were tainted with the intention of tax evasion and therefore, any belief based on such resolution cannot be said to be bonafide.

20. It does appear from the record that the assessee

had disclosed material having bearing on the computation of his income in the quantum proceedings. As noted above, the agreement dated 28-2-1977 as modified by the supplemental agreement dated 4-3-1977 clearly stipulated that interest was payable on the deferred consideration and that payment of interest was the essence of the contract. The deed of assignment dated 28th June 1977 clearly incorporated the terms of payment of interest as noted above. These documents were produced during the quantum proceedings and the explanation of the assessee for not showing interest as having accrued for the period between 1-7-1977 to 30th June 1978 was that there was a change in the mode of payment as per the proposal of Elscope dated 15-6-1978 which was accepted by the resolution of 30th June 1978 by the assessee. Though the meaning put by the assessee to the resolution dated 30th June 1978 that it had a retrospective effect and the mode of payment of interest got substituted retrospectively from the date of the deed of assignment did not find favour at any stage of the quantum proceedings and it was rightly held that the fact that interest that had accrued upto 30th June 1978 on day to day basis, could not be reversed by the alleged retrospective effect of the said resolution, and that there was no commercial expediency to forgo it, the fact remains for the purpose of penalty proceedings that the genuineness of the resolution dated 30th June 1978 has never been questioned at any level of the quantum or the penalty proceedings and even the learned counsel for the Revenue has not assailed that resolution on the ground that it was fake or concocted. His attack was on the ground that this resolution did not bring about a valid change in the existing terms of contract under which the payment of interest accrued from the date of the transaction i.e. 1-3-1977 and it, therefore, accrued even during the previous year ending on 30th June 1978 relevant to the Assessment Year 1979-80. The contention that there was no valid acceptance of the proposal contained in the letter dated 15th June 1978 and the resolution of 30th June 1978 was only a counter proposal and therefore, there did not come about any modification in the mode of payment changing the date of accrual of interest to 1-7-1979 was raised for the first time before us by the learned counsel with his usual vehemence. On perusal of the letter dated 15th June 1978 containing the proposal and the resolution dated 30th June 1978, it is difficult to hold that there was no substitution made in the mode of payment. As noted above, in the resolution dated 15th June 1978, Elscope after referring to the contents of the deed of assignment dated 28th June 1977, under which interest was made payable which term was treated as of essence of the

contract, a proposal was made for a change in the method of payment of the balance amount, as per which, on the amount which was to be made payable on demand, no in interest was to be charged, while on the amount payable by five equal installments, interest was to be charged at 11% per annum with effect from 1st July 1979. The vendee confirmed that it shall provide the assessee same security as it would get from the ASE or security similar to the security as may be provided by them in respect of the deferred purchase consideration. In the resolution dated 30th June 1978, after referring to the proposal dated 15th June 1978, a resolution was passed by the Board that, `the company do hereby approve, accept and adopt the following revised mode of payment' as contained in letter dated 15th June 1978.

20.1 In the penalty proceedings, by its letter dated 9th March 1988, the assessee adduced additional material in order to show that the explanation given during the quantum proceedings by it was bonafide. In the letter dated 9th March 1988, which is on record, the assessee, inter alia, informed the ITO that the company transferred and assigned its undertakings to Elscope with effect from 1st March 1977 on the strength of the resolution passed by the Board of Directors on 25-2-1977, which was enclosed. A circular resolution was also passed on 3rd March 1977 and in both these resolutions, there was a specific mention to 1-7-1978 as the date from which the deferred purchase price would carry interest at 11% per annum. A copy of the corresponding resolution of the vendee company was also produced. It was urged in this letter that the correct conclusion that could be drawn from these documents was that interest on unpaid purchase price was payable at 11% per anum from 1-7-1978 and the purchaser company had no obligation to pay interest from 1st March 1977 and the assessee had no right to claim interest from that date. It was then stated that the purchaser had sent proposal dated 15-6-1978 which was accepted by the resolution dated 30th June 1978 under which the date of accrual of interest on the installment amounts was shifted to 1-7-1979. It was the case of the assessee in the said letter that `initially, the parties to the agreement had decided that the consideration for sale of undertaking was not to carry interest upto 30th June 1978, and thereafter, by mutually agreement, it was decided by the parties to the agreement that the interest on installments will commence from 1-7-1979'. It was, therefore, contended that the assessee company had a bonafide belief that the said interest amount could not represent its income and therefore, it did not offer the same. It was also pointed out that, in similar cases of

its sister concerns Fabriquip and Packart, penalties under section 273(2)(a) were deleted.

20.2 The additional material relied upon by the assessee in the penalty proceedings in form of the resolutions dated 25-2-1977 and 3-3-1977 was discarded by the Tribunal as inconsistent and a stand different than the one taken by the assessee in the quantum proceedings and on the ground that, as per these resolutions, the unpaid purchase price was to carry interest with effect from 1-7-1978, while under the resolution dated 30th June 1978 relied upon by the assessee in the quantum proceedings, it was shown that such interest was to be charged from 1-7-1979. This line of reasoning was adopted by the learned counsel for the Revenue also, who submitted that the stand taken up in the penalty proceedings that the date 1-7-1978 was fixed in the resolutions dated 25-2-1977 ad 3-3-1977 was false, because, if that were so, this date would have been mentioned also in the proposal of 15th June 1978 and the date of 1-7-1978 would have been in that event specifically shifted to 1-7-1979 in the resolution dated 30th June 1978. In other words, since 1-7-1978 was not the date mentioned at all in any of the agreements or the deed of assignment, or the proposal dated 15-6-1978 and the resolution dated 30-6-1978, it was only now proferred to bolster up the contention that the explanation on the basis of the resolution dated 30th June 1978 given by the assessee in the quantum proceedings was bonafide. There is more sound than substance in this reasoning. The resolution dated 30th June 1978, which modified mode of payment, clearly recorded that interest on the deferred payment was to be paid from 1-7-1979. The original stipulation about payment of interest was sought to be changed by this substituted mode of payment under which the balance of the deferred purchase price was to carry interest only from 1-7-1979 on the amount of Rs.4,75,000=00, which was to be paid on installments and no interest was to be paid on the amount of Rs.2 crores. As per this arrangement, no interest was to be charged for the Accounting Year 1-7-1977 to 30-6-1978 since it was to be charged only from 1-7-1979. Under the resolutions dated 25-2-1977 and 3-3-1977 also, no interest was to be charged for the said period i.e. 1-7-1977 to 30-6-1978, because, it was to be charged from 1-7-1978 as mentioned in them. The resolution dated 30th June 1978 extended that concession upto 30th June 1979 by providing that the amount will carry interest only from 1-7-1979, which means one more Accounting Year was included for the purpose of concession of not charging interest, which concession already operated under the

resolutions dated 25-2-1977 and 3-3-1977 for the Assessment Year 1979-80. There is therefore no discrepancy in the stand taken by the assessee in the quantum and penalty proceedings. In the penalty proceedings, explanation given earlier in the quantum proceedings on the basis of resolution dated 30th June 1978 under which according to the assessee, interest was to be charged only from 1-7-1979 was sought to be substantiated by pointing out that even under the earlier resolutions dated 25-2-1977 ad 3-3-1977, it was not to be charged for the Accounting Year 1-7-1977 to 30-6-1978, since as stipulated in those resolutions, interest was to be charged from 1-7-1978 only. It is altogether a different matter that, in the quantum proceedings, it was held on the basis that the resolution dated 30th June 1978 could not operate retrospectively to undo the accrual of interest that took place on the basis of mode of payment stipulated in the agreement and the deed of assignment by which interest was payable during the Accounting Period of 1-7-1977 to 30-6-1978 since in the deed of assignment, the date of 1-7-1978 which was mentioned in the resolutions of 25-2-1977 and 3-3-1977 was not at all incorporated. It is not as if the assessee had received interest and not show it. Only that, it went wrong in its calculation that it could retrospectively undo the effect of the stipulation of payment of interest incorporated under the deed of assignment, by which the interest accrued at the rates mentioned therein on the amounts outstanding from time to time from the date of the transaction, which admittedly was 1st March 1977. It is no one's case that the resolution dated 30th June 1978 was sham or bogus. It would, therefore, appear that the assessee was under a belief that by making such resolution, it could retrospectively substitute the stipulations regarding the mode of payment so as to make the interest accrue only from 1-7-1979, so that it may not have to pay tax on accrual basis for the period until the earlier stipulation of payment of interest on the amount outstanding from time to time operated. The assessee's case falling under sub-clause (B) to Explanation 1 to section 271(1)(c)(iii), therefore, is covered by the proviso to the Explanation 1 to the effect that the preponderance of probabilities point to the belief to be bonafide though not legally tenable on the ground that the resolution intended to be retrospectively changing the mode of payment could not really affect the accrual of interest that already took place before its passage.

20.3 The facts relating to the explanation given in the quantum proceedings and material to the computation

of the total income were disclosed during the quantum proceedings. The assessee had in response to a query, produced the said proposal dated 15th June 1978 and the resolution dated 30th June 1978 and relied upon them for its claim that the interest was under the resolution now made to accrue from 1-7-1979 instead of its accrual as originally stipulated in the deed of assignment from 1-3-1977. The requirement of the proviso to Explanation 1 therefore stood satisfied and the presumption under the Explanation would not apply in the case of the assessee. Therefore, the burden would be on the revenue to prove that the assessee concealed the particulars of its income. Merely because, interest that accrued was not shown as income in the return, it did not necessarily follow that there was concealment of particulars of income. The particulars of income would be - the factual material on the basis of which the income can be computed by the ITO / AAC or the Commissioner (Appeals), as the case may be, in the course of the quantum proceedings.

20.4 The contention of the revenue that non-mention of interest amount as income in the returns should be sufficient to establish concealment, is misconceived. When the return is filed, the assessee's case obviously is that, according to him, what is computed by him in the return, is his total income. If the Department does not accept it, then a procedure under section 143(2) required the ITO, who wants to verify the correctness and completeness of the return, to require the presence of the assessee or the production of evidence in respect thereof. When called upon to produce evidence, the assessee can put up the explanation and particulars in support of his claim. Therefore, the contention of the Revenue that since the resolution dated 30th June 1978 was not produced alongwith the return which was filed on 14-12-1978 i.e. after the date of the resolution, it could not be looked into, is misconceived. The explanation and the facts material to the computation of the total income can be produced during the assessment proceedings in which if the particulars of the assessee's income are not disclosed, or if inaccurate particulars are furnished, that will give rise to liability to pay penalty under section 271 of the Act.

20.5 The question that, therefore, remains to be considered is, whether the Revenue proves that particulars of interest income which is added in the Assessment Year 1979-80 were concealed by the assessee during the assessment proceedings. The particulars on the basis of which accrual of income could be worked out for the Accounting Period of 1-7-1979 to 30-6-1978 would

be those which formed source of information about that income on the basis of which, the interest income could be ascertained and worked out by computing total income. be ascertained and worked out while computing the total income. supplemental agreement dated 4-3-1977 clearly referred to the fact that the date of transaction was 1st March 1977 and that, under the mode of payment adopted thereunder, interest at the rates stipulated was to be paid from the date from which the amount of consideration was outstanding and on such amounts which remained outstanding from time to time. It is precisely from these particulars that the ITO raised specific queries during the proceedings in response to which, the resolution dated 30th June 1978 accepting the proposal of Elscope made on 15th June 1978 for substituting the terms of payment incorporated in the agreement and deed of assignment was produced during the assessment proceedings. It has also come on record that, in the notes `annexed to and forming part of the balance sheet as on 30th June 1978 mentioned the fact that the deferred sale consideration pertained to the amount receivable in instalments from the subsidiary company Elscope Pvt. Ltd. `for the transfer and assignment of the industrial undertaking and business'. The amount of deferred sale consideration of Rs.6,54,10,253=00 was mentioned as due on 30th June 1977 which was reduced to Rs.4,94,81,765=00 at the end of 30th June 1978 and the payments received during the year towards the deferred consideration were also disclosed. Admittedly, it was not a case where interest was received by the assessee but was not shown. The balance sheet of the subsidiary Elscope was also produced as required by law and there was no inconsistency urged between the two balance sheets.

20.6 Thus, the record shows that all the relevant particulars on the basis of which the income of the assessee could be computed were disclosed by the assessee and a claim was put up that the interest cannot be said to have accrued, because, the original terms of payment of deferred purchase price were substituted by the resolution passed on the last day of the Accounting Year i.e. 30th June 1978, by which the accrual date of 1-3-1977 which could be spelt out from the agreement dated 28-2-1977 as modified by the supplemental agreement dated 4-3-1977 and the deed of assignment dated 28th June 1977, was shifted to 1st July 1979. The fact that such retrospectively could not be given to shift the accrual date after the interest had already accrued would not mean that the income on account of accrual of interest, on the claim not being accepted, could not be worked by the ITO on the basis of the relevant particulars already

furnished. In fact, on the basis of disclosures already made during the proceedings, interest income was added in the total income in the quantum proceedings.

20.7 For the foregoing reasons, we are of the opinion that there was no justification for imposing penalty under section 271 (1) (c) of the Act on the assessee for the Assessment Year 1979-80. The question referred to this Court in Income Tax Reference No. 58 of 1995 is accordingly answered in the negative in favour of the assessee and against the revenue. The reference stands disposed of accordingly with no order as to costs.

21. The above answers to these four references are briefly summed up as under :

Income Tax Reference No.56 of 1986 (Answered in paragraphs 16 and 16.1) :

A.Y. 1979 - 80 ::

The questions Nos. 1, 2 and 3 raised at the instance of the assessee are answered in the affirmative, in favour of the Revenue and against the assessee.

A.Y. 1980 - 81 ::

The questions Nos. 1 and 2 raised at the instance of the assessee are answered against the Revenue and in favour of the assessee.

The reference stands disposed of accordingly with no order as to costs.

Income Tax Reference No.75 of 1987 (Answered in paragraph 17.12) :

A.Y. 1979 - 80 ::

The question referred to this Court is answered in favour of the Revenue and against the assessee. The reference stands disposed of accordingly with no order as to costs.

Income Tax Reference No.220 of 1995 (Answered in paragraph 18.4) :

A.Y. 1979 - 80 ::

The question referred to this Court is answered

in the negative, in favour of the assessee and against the Revenue. The reference shall stand disposed of accordingly with no order as to costs.

Income Tax Reference No.58 of 1993 (Answered in paragraph 20.7) :

A.Y. 1979 - 80 ::

The question referred to this Court is answered in the negative, in favour of the assessee and against the Revenue. The reference shall stand disposed of accordingly with no order as to costs.

[R.K.ABICHANDANI, J.]

[K.A.PUJ, J.]

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